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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF APPEALS

—OF—

WEST VIRGINIA,

AT THE FALL-SPECIAL TERM, 1896, SPRING-SPECIAL
TERM, JUNE TERM, SPECIAL TERM IN AUGUST,
SEPTEMBER TERM, AND FALL SPECIAL
TERM, 1897.

(December 16, 1896, to November 17, 1897.)

—BY—

EDGAR P. RUCKER,

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REPORTS OF DECISIONS
OF THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA.

Fall - Special Term, 1896.

CHARLESTON.

WARD *v.* WARD.

Submitted June 10, 1896—Decided December 16, 1896.

DEED—*Delivery of Deed—Burden of Proof.*

The possession of a deed duly executed and acknowledged, with all the formalities required by law, is *prima facie* evidence of its delivery; and when a father seeks to set aside such deed to a son, on the sole ground that the son wrongfully came into possession of it, the burden of proving such wrongful possession is upon the father. (p. 2.)

Appeal from Circuit Court of Barbour county.

Bill by Acquilla J. Ward against Taylor Ward. Decree for plaintiff. Defendant appeals.

Reversed.

JOHN BASSEL and S. V. WOODS for appellant.

DAYTON & DAYTON and F. O. BLUE for Appellee.

43	1
48	205
43	1
45	257
43	1
50	111
60	226

DENT, JUDGE :

Acquilla J. Ward filed his bill in chancery in the Circuit Court of Barbour county, seeking the cancellation of a deed made to his son Taylor Ward, bearing date the 10th day of January, 1885, and conveying, after the father's death in consideration of five thousand dollars, a certain valuable farm, known as the "Al. Ward Farm," in said county. Taylor Ward filed his answer, denying the allegations of the bill to which plaintiff replied generally. Many depositions were taken, and, on a final hearing, the Circuit Court entered a decree canceling the deed as a cloud on the plaintiff's title. From this decree the defendant appeals.

The single question presented for our consideration is as to whether the deed was fully consummated by delivery. There appears to be no dispute as to the law, but it is recognized to be as laid down by this court in the case of *Davis v. Ellis*, 39 W. Va. 226, (19 S. E. 399), following *Lang v. Smith*, 37 W. Va. 734, (17 S. E. 213), and *Newlin v. Beard*, 6 W. Va. 120, and is to the effect that where the grantor parts with the possession of the deed to the grantee or his agent, reserving no right to recall it or alter its provisions, the delivery is effectual, and the grantee succeeds to the title. "When the deed is found in the possession of the grantee, a delivery is presumed to have been made by the grantor and it devolves upon the grantor who denies the delivery to rebut such presumption." 5 Am. & Eng. Enc. Law, 447; *Ward v. Lewis*, 4 Pick. 518, and other cases therein cited; also, *Newlin v. Beard*, *supra*. The investigation is narrowed down to the mere question of fact as to whether the plaintiff, on whom the burden of proof devolved, has established a non-delivery of the deed in controversy. The allegation of the plaintiff's bill relating to this subject is in these words: "Further complaining, plaintiff says that after his removal to his said son's upon the death of his first wife, said deed, for said 406 acres of land, which had never been delivered, was taken by him with a large number of other valuable notes and papers, and left by him in the care and keeping of his daughter-in-law, the wife of said defendant, for safe keeping only, and to be delivered to him (plaintiff) alone,

when asked for. Three years and a half almost after the preparation of said deed, after it became known that plaintiff contemplated marrying again, the said defendant, Taylor Ward, wholly without the knowledge and consent of plaintiff, procured, in some manner wholly unknown to plaintiff, the possession of said deed, and secretly, on the 9th day of July, 1888, caused the same to be admitted to record in the county court clerk's office of said county. Of the recording of said deed, plaintiff knew nothing for months after, and he charges that the said Taylor Ward sought to keep the same a secret from him. When he asked for said deed from the said wife, in whose custody the same was left, he was informed by her that she could not find it;" and, in relation to the making of said deed, he said in these words: "That on the 10th day of January, 1885, thinking to make an arrangement and such disposition of his estate, looking to the uncertainty of life and to the certainty of death, as he deemed a prudent man should make, he called upon an attorney, and caused to be drawn and prepared—First, the deed to his son, the defendant, hereinafter more particularly set forth; and, Second, his last will and testament, by which he made final disposition of his property. The whole object of this plan and arrangement on his part, wholly voluntarily, was to settle his affairs, and make such disposition and distribution before and after his death as he desired among his said wife and children. By said deed, prepared on said 10th day of January, 1885, and acknowledged at the time before the attorney who ordered the same, he being a notary of said county (as also said will was at the time witnessed by him and another called in for the purpose), he conveyed to said Taylor Ward what was commonly known as his 'Albert Ward Farm,' containing 406 acres, more or less, situate in said county, and very valuable, worth at least, \$13,000 to \$16,000; that said deed on its face purports to be in consideration of \$5,000 in hand paid, and retains the entire use and control of said land for and during plaintiff's life, in him, the said plaintiff."

The denial of the defendant's answer to the allegation of the plaintiff's bill relating to the delivery of the deed is as follows: "Respondent indignantly denies that he procured the deed in the bill mentioned in some way unknown

to plaintiff, and he also denies that the same was ever left with his wife for safe-keeping until the same should be called for, but, on the contrary, the same was delivered to respondent by the plaintiff, on the same day when he returned with it from Philippi, where he had gone to have the same prepared; and, when the same was delivered to respondent, he inquired of plaintiff if he had considered that well, and if he was not afraid that he would want that land himself; whereupon the plaintiff informed him that he had kept a life estate in it, which was as long as he would want the land, and that he had always intended the same for respondent, because he had been a good son, and had done more to help him along than any of his children, and at the same time the plaintiff requested respondent not to admit the said deed to record for a few years, and assigned as a reason that the recording of the paper might 'hurt him in his business'; whereupon respondent agreed that he would not record the same, and did not do so, until July 9, 1889, and only did it then because he learned on every hand that plaintiff was saying that, if he got that deed, he would destroy it, and that he had been consulting an attorney to know if the deed 'would stand,' whereupon, as a matter of precaution, respondent did have the same recorded."

In his testimony, the plaintiff entirely abandons the allegations of his bill, and says, in answer to the question propounded by his attorneys, "What did you do with the deed to Taylor Ward for the Al. Ward farm?" "I handed it to his wife, and told her there was a paper I wanted her to keep for me until I called for it." On cross-examination, the plaintiff develops an exceedingly poor recollection with regard to the disposition of the deed, but says: "I took the deed, and gave it to his wife, either that day or the next; and she was there at my house." "It was in my wife's sick room." "I can't say who all were there." "There may have been two or three present." "I can't recollect whether Taylor was there." "He might have been there." "They were living in their own house. They never lived with me. She was coming every few days to wait on my wife." "I told her there was a paper I wanted her to take and keep for me. She took it home with her to her own house." "I never saw that deed after

I gave it to her until I saw it on record here, in the clerk's office." And he admits that he never called for it until four years afterwards, when, in accordance with the advice of counsel, he took a witness by the name of Winny Wilson, and, in the absence of Taylor, went to his house, and asked his wife to let him see the deed he had left with her for safe-keeping. On being asked if the delivery of the deed did not occur in the manner detailed by Taylor and his wife, he answers: "I have no recollection of anything like that taking place there. I know distinctly of handing her a paper, and telling her to keep it until I called for it." The evidence of the defendant, corroborated by his wife, as to the manner, time, and place of the delivery, is, in his own language, as follows, to-wit: "Answer 7. That was the very day that he brought the deed home from Mr. Dayton's office. He brought to his house, at A. J. Ward's house. My wife and I were there at his home. I was sitting by a stand table, reading a newspaper. And, after he had eaten his dinner, he sat down on the opposite side of the stand from me, and pulled a paper out of his pocket, and handed it to me, and says, 'Here, I have doeded Ira Ward the Worth Ward farm.' Says, 'I have got one for you, too,' he says; and I asked him what that was, and he said a deed for the Al. Ward farm, and he took out of his pocket, and handed it to me, and I told him he had better keep it. He said he had kept the land as long as he lived; that he had reserved the life estate for his life, as long as he lived. Says he, that, 'when I am done with it, I intend for you to have the land. You are to have it when I am done with it.' I said to him he had better keep it; he might change his mind before he died; somebody else might be that he would want to have it. He said, 'No; I intend for you to have the land,' and he handed me the deed. I took the deed, looked at it, and laid it down on the stand. When I got up, and walked away like, he picked it up, and handed it to my wife like, and told her to take it. My mother said, 'Take it, Libby; you and Taylor have done more for us than any of the rest of the family, and you might as well have it as anybody.' She took it then and handed it back to me, and I put it in my pocket, and took it home with me; and I have had it ever since. After I had set down again, he told me he had put

a consideration of five thousand dollars in the deed. I told, 'you don't expect me to pay five thousand dollars, do you?' He said he did not; he had receipted me for it in the deed; but that he would give me a receipt if I wanted it then. I say that I am telling the truth. I would not tell a lie for the land. I said in the start that I would tell the truth about this matter; that I didn't want anybody to swear a lie for me. I say this because my father is sitting here, shaking his head at me, and his finger. He did it at my witnesses all the way through. That is about all that was said that day that he delivered the deed to me."

If that was all the evidence in the case, the plaintiff would necessarily fail, as the allegation of his bill is not only not sustained, but disproven, by his own testimony. He also proves the delivery of the deed to the wife of the defendant, which is a good delivery to him, for the reason that his wife is his agent as to the possession of his property, and has the legal right to receive and hold the same for her husband. He says, however, that he delivered it to her for a special purpose, and thereby made her his agent. The presumption of the law is against him, and he must rebut this presumption by a preponderance of testimony. In this he has not succeeded, as the testimony of the defendant and his wife must be considered, at least, equal to the plaintiff's testimony. The plaintiff took the depositions of numerous witnesses to prove that the defendant said on different occasions that he refused to take the deed from his father when he first offered it to him, and that his father then gave it to his wife to keep. This testimony, in the main, instead of contradicting, sustains, the defendant and his wife. The defendant, on the other hand, shows, by numerous witnesses, admissions of his father tending to support the delivery of the deed. It is sufficient to say that the oral testimony, as a whole, preponderates in favor of the defendant.

There are circumstances surrounding this transaction that throw more light upon it. One is the attempt of the plaintiff, after he had changed his mind, to "prepare" his testimony. Without letting his son know anything about it, and in his known absence, he takes a witness along with him, and visits the wife of the defendant, and, catching her unawares, asks her for the deed he left with her.

He knew at this time that the deed was on record, and not in her possession, and his sole object appears to have been to get some unexpected admission out of her that he could use against his son. His son, when he heard it, was justly indignant that they, in the language of Samson, should attempt "to plow with his heifer." His father's only excuse for so doing was that he was acting in accordance with his instructions. The plaintiff also tried to get his daughters to influence defendant to give up the deed, and, as an inducement, insisted he wanted the land back, that he might deed it to them. When the defendant was approached on the subject, he said, if his father wanted it deeded to the girls, he would do so. But the plaintiff would not agree to this, but said, if he had the land back he "could marry Betty West." This is the old, old, and oft-repeated story, where a man and his wife have spent the summer of life together, have reared a family of boys and girls to maturity, and, by their mutual labors and the assistance of their children, have accumulated a considerable estate, and now, as they are growing old, and the autumn is verging into winter, the weaker and probably overworked vessel, no longer able to resist the infirmities of nature, takes her bed for the last time. She feels that her days are numbered, but before she departs, she insists that her husband shall do justice to her children. He, ready and willing to please her, and make her last moments happy, hastens to a lawyer, has him draw up a deed to his son Ira for one farm; another deed to his son Taylor for another farm, in which he retains a life estate and his home farm also, that he may be secure in a home in his wifeless old age; then he has a will prepared providing for his four daughters, all of whom are married. The will he leaves with his lawyer, but the deed he takes with him, and hurries homeward. At the bedside of his dying companion, he finds his favorite son, and not less favorite wife, keeping affectionate watch and care. Having satisfied his appetite, he enters the room to make them all happy. He first takes Ira's deed, and says, "Taylor, I have deeded Ira his farm." Then he takes out another deed and says, "Taylor, I have got one for you, too." "I have deeded you the Al. Ward farm, but have reserved a life estate in it. When I am done with it, I intend that you

shall have the land." But Taylor, modest and overwhelmed with his father's generosity, hesitatingly replies: "You had better keep it. You might change your mind, and might want some one else to have it." "No," he replies; "I intend for you to have the land," and hands Taylor the deed. Taylor takes it, but, still undecided what to say or do, lays it down on the stand. The father picks it up, hands it to Taylor's wife, and tells her to take it. The mother, from her sick bed, rejoicing in their joy, says, "Take it, Libby; you and Taylor have done more for us than any of the rest of the family, and you might as well have it as any body." The daughter-in-law then took the deed, handed it to her husband, who put it in his pocket, and took it home with him when he went, with the understanding that he was not to put it on record for a time. This is true to human nature, and in accordance with the ordinary conduct of human beings—while the story related by the plaintiff, that he did not mention the deed to his son Taylor, but simply handed it, at some unrecollected time, to his daughter-in-law, telling her, "Here is a paper; keep it for me until I call for it," bears on its face the manifest appearance of after consideration; for if he did not intend to deliver the deed, Taylor not being entitled to the land until after his death, why did he not include it in his will, written at the same time, and save the execution of two separate instruments? Evidently, a change in his circumstances has produced a change in his mind. The wife he sought to please is under the sod, and promises made to those who lie in a graveyard soon lose their binding force when there is no eye to see, no ear to hear, no heart to feel. In her presence he thought to wind up his business, see that his and her children were well fixed in life, and then, "folding the drapery of his couch around him, lie down to pleasant dreams." But new blood is coursing through his veins. New ambitions are filling his mind, and stirring his energies, rejuvenating him, and causing him to cast off the lethargy of age. He yearns for the companionship of the gentler sex, and who can blame him who has once enjoyed the tender, gentle, affectionate solicitude and society of a good wife? Peradventure he looks not upon the elderly maiden ladies of his own age, but with longing eyes and palpitating heart

covets a young, strong and buxom helpmeet. But she is not for old and second-hand widowers, such as he, unless she can receive a goodly settlement as a balm for her youthful affections. The Al. Ward farm about fills the measure. He therefore, quelling any lingering qualms of conscience, undertakes to undo what he has so solemnly and legally done. He fears to approach his son Taylor on the subject, well knowing that he is a "chip of the old block," but secretly endeavors to make out a case of non-delivery; but, when he finds that this is a failure, he approaches Taylor with persuasive influence, and finally attempts to buy him out at a figure which Taylor refuses to accept. Taylor is disposed at times to be lenient towards his father and so expresses himself; but when he thinks of the object had in view, and the solemn manner in which he was invested with the property, in the presence of his dead mother, and that his father only wants the return of the property to buy some one to fill that mother's place, his whole nature rebels. The fires of mother love never die out in the breast of a dutiful son, and a niche is always kept in his heart for her who gave him birth and life, that no other can fill. The father, finding his son obdurate even against threats to kill him, seeks a court of equity; and the only allegation contained in his bill to invoke its assistance he abandons in his proof, and the only thing contained in his evidence that would entitle the court to interfere is the assertion that when he handed Taylor's wife the deed, he told her "to keep it for him until he called for it." To establish this reservation, the burden was on him, and in this he has entirely failed. The evidence and circumstances both heavily preponderate against him. And while a fellow feeling that he might marry the woman of his choice, which is now placated by the fact that he is already married, may appeal to the individual sympathies of the members of the court, yet such considerations can have no weight in the administration of abstract justice, according to the certain fixed rules governing courts of equity. In this case equity leaves the parties in the situation in which they have placed themselves by their solemn legal acts. To do otherwise would be to open the doors wide to any one who may hereafter, by a change of feelings, become dissatisfied with any writing obligatory, it matters not how formally

or carefully executed. *Lipscomb v. Love*, 38 W. Va. 546, (18 S. E. 732).

The counsel for the plaintiff insists that this case comes within the rule this Court has laid down in the case of *Smith v. Yoke*, 27 W. Va. 639, approved in *Bartlett v. Cleavenger*, 35 W. Va. 720, (14 S. E. 273), and *Richardson v. Ralphsnyder*, 40 W. Va. 15, (20 S. E. 854). This rule is simply, in effect, as stated in the opinion of Judge Snyder in the first case (page 642): "When the testimony leaves the result in doubt, the Appellate Court ought not to reverse the decree." There is a growing impression prevailing to some extent among counsel that the Court has simply adopted this rule to avoid the examination of cases in which the testimony is conflicting. Such is far from the truth; but the Court means to say that if, after the most careful scrutiny, the conflicting testimony leaves the case in such a pivotal condition that it is a matter of doubt as to which side ought to prevail, it becoming a mere matter of conjecture, this Court will not disturb the determination of the lower court, in obedience to another well-established rule, that the burden is on the appellant to affirmatively show error to his prejudice. But in no case does this Court refuse to weigh the testimony, however conflicting, and give the party the benefit thereof in whose favor it plainly preponderates.

In the case now under consideration the preponderance is clearly with the defendant, and for this reason the decree of the Circuit Court is reversed, and the bill is dismissed.

ON REHEARING.

The conclusion reached in this case is fully and completely sustained by the pleadings and evidence. That the plaintiff delivered the deed in controversy there cannot be even a plausible doubt. On its face it shows that it was intended for immediate delivery, in the use of the following words: "But it is expressly agreed, understood, and stipulated by the parties hereto that no title shall pass hereby to the land above described until after the death of the said Acquilla J. Ward, but said A. J. Ward shall retain and have exclusive possession, use, and control of said land until his death, when the same shall pass by

this conveyance unto the said Taylor Ward, as herein aforesaid." Why this strong stipulation, and how could it be accepted by the grantee until and unless the deed was delivered? That plaintiff afterwards endeavored to entrap the wife of the defendant into an admission of being his depository is established beyond contradiction; and, if his counsel feel any irritation on account thereof, they should place the blame on their client, as he did on them. Equity requires a clear case and clean hands from those who ask its interposition. When these are wanting, prayer for relief will be unavailing.

The former decree of this court, reversing the decree of the circuit court, and dismissing plaintiff's bill, will be confirmed.

Reversed.

CHARLESTON.

BERKELEY v. CHESAPEAKE & O. RY. Co.

Submitted September 15, 1896—Decided December 19, 1896.

1. **RAILROADS—*Railroad Crossings—Damages—Contributory Negligence.***

Where a party with no defect in his sight or hearing attempts to cross a railroad track at a street crossing in a city, without looking or listening for the approach of a train, and is struck and injured by a train moving on said railroad, his negligence is such as to preclude him from recovering damages for such injury, although the servants of the railroad may have been negligent in failing to ring a bell or blow a whistle before reaching said crossing, as required by statute. (p. 16.)

2. **RAILROADS—*Railroad Crossings—Contributory Negligence.***

The person thus attempting to cross the railroad track, and the company owning the railroad, have mutual and reciprocal duties and obligations in such case; and, though a train has the right of way, the same degree of care and diligence to avoid collision is due from both. (p. 16.)

3. **RAILROADS—*Railroad Crossings—Damages—Contributory Negligence.***

It is the duty of the pedestrian at the street crossing of a

railway to look carefully for an approaching train, and, if the view is obstructed, to listen before attempting to cross the track; otherwise, he will himself be guilty of negligence, which will prevent his recovery for an injury received in crossing. (p. 16.)

4. PLEADING—*Demurrer—Bill of Exceptions.*

Where there is a demurrer to the evidence, the evidence given in the cause on both sides is stated in the demurrer, and not set forth in a bill of exceptions. (p. 13.)

Error to Circuit Court, Cabell county.

Case by J. M. Berkely against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error.

Reversed.

SIMMS & ENSLOW for plaintiff in error.

ISELL & WIATT and CHAS. E. HOGG for defendant in error.

ENGLISH, PRESIDENT:—

This was an action of trespass on the case, brought by J. M. Berkely against the Chesapeake & Ohio Railway Company, a corporation, in the Circuit Court of Cabell county, on the 30th day of August, 1893, to recover damages for an injury alleged to have been inflicted upon the plaintiff while crossing the track of said railroad in the city of Huntington, on Seventh street, in this: that the defendant, by its servants and agents, negligently drove its locomotive engine and tender against the plaintiff with great violence, and threw the plaintiff with great force upon the ground, thereby causing him great bodily injury, etc., to the damage of the plaintiff twenty thousand dollars. The defendant demurred to the plaintiff's declaration, which demurrer was overruled by the court, the plea of not guilty was interposed, and issue joined thereon, and the case was submitted to a jury, the testimony was submitted, and the defendant demurred to the plaintiff's evidence; and the jury found for the plaintiff, and, assessed his damages at two thousand dollars, and, if the court found for the defendant on its said demurrer, then they found the defendant not guilty; and the court, having found that the law was for the plaintiff on said demurrer, overruled the same. The evidence was set out, and the

court entered judgment for the plaintiff on the verdict, and the defendant obtained this writ of error. The demurrer to the declaration is not insisted on in the argument, and, as it seems sufficient the demurrer must be regarded as waived. The defendant, at the close of the testimony, demurred to the plaintiff's evidence, in which demurrer the plaintiff joined, setting forth the evidence in the demurrer, which demurrer, being considered by the court, was overruled, and judgment given for the plaintiff for two thousand dollars, the amount of the verdict; and the defendant obtained this writ of error.

Now, the evidence shows that the plaintiff, on the 24th day of April, 1893, attempted to cross the Chesapeake & Ohio Railway track, at Seventh street, in the city of Huntington. The plaintiff, in his testimony, says: "When I got to the railroad, this little switch engine was going up. I saw it just below the street. It was coming up, and I stayed there; stopped—I don't know—perhaps some ten or fifteen feet from the track, until it passed up. Then I started across on the regular crossing, right where I always crossed. I had crossed there two or three times a day, and, when I got on the track after he had passed up with his engine, I started over as usual; and I suppose he reversed his engine quick, after I got on the track. I cannot remember any more." On cross-examination, he was asked: "How far did you see it away from the street before you started across the track? How far had it gone by you? A. I cannot tell exactly, but I suppose, maybe, the engine was the length of it or more from me when I started across. Q. You did not wait to see whether it was coming back or not? A. Well, he run up, and went past me, and I cannot tell. Q. You thought it was still going on further, did you? A. That was my idea, of course. Q. You did not look to see whether or not it was coming back as you stepped on the track? A. No, of course, I did not look to see. Q. If you had looked, was there anything in the way that would have prevented you from seeing it coming back at the time you started to go on the track? A. Of course, I could have seen it if I had looked up, I suppose; but the way he does there, he reverses so quick that little engine. Q. You knew that, did you? A. No; I never noticed until afterwards. Q. At

the time you went to step on the track, if the engine had been coming back, and you had looked, could you have seen it? Was there anything to prevent you from seeing it? A. Nothing at all." Now, these are the facts detailed by the plaintiff himself bearing upon the question of contributory negligence. The law upon this question has been well settled in the different states, and in the Supreme Court of the United States. In the case of *Hogan v. Tyler*, 90 Va. 19, (17 S. E. 723) the Court of Appeals of Virginia, held that "where a person, after standing near a crossing, attempts to cross, and is run over by a train which he might see or hear if he looks or listens, is guilty of such contributory negligence as will prevent a recovery for his death, notwithstanding negligence of defendant in failing to sound the whistle or ring the bell." So also in the case of *Marks' Adm'r v. Railroad Co.*, 88 Va. 1, (13 S. E. 299): "Plaintiff's intestate, a one-eyed woman, 53 years old, reached within 4 feet of railroad track crossing over frequented street, and stopped on walkway to wait till freight train passed. It passed her, but stopped before its rear car had got halfway across the street, which was less than 60 feet wide. Brakeman at switch 15 feet distant signaled engineer with hand and voice to back. Train moved slowly back, having no outlook on leading car. In the meantime, intestate remained on walkway, between brakeman and train, in unobstructed view of both. When train had reached within two or three steps of her, she started across the track, was run over, and killed. Held, company was guilty of negligence, but intestate's own negligence was the proximate cause of the injury, and plaintiff cannot recover." In the case of *Improvement Co. v. Stead*, 95 U. S. 161, it was held that "travelers upon a common highway which crosses a railroad upon the same level, and the railroad running a train, have mutual and reciprocal duties and obligations; and, although the train has the right of way, the same degree of care and diligence in avoiding a collision is required from each of them." The Supreme Court of Missouri, in the case of *Kelsay v. Railway Co.*, 129 Mo. 362, (30 S. W. 329,) held that "a traveler on a highway approaching a railroad crossing must, at convenient distance therefrom, look in both directions before attempting to pass over it, if, by so doing, a

coming train can be seen. Such duty is a continuing one, and will not be performed by looking only from a point at which the view of the track is obstructed. Where the evidence shows that plaintiff, in approaching the crossing, did not look both ways with the care required by common prudence, or did not look at all until too late to avoid the collision, the company will not be liable." Upon this question a strong case is presented in that of *Cadwallder v. Railway Co.*, 128 Ind. 518, (27 N. E. 161;) the court in that case holding that "one who approaches a railroad crossing with which he is familiar, and attempts to cross without looking and listening for approaching trains, where it is possible to do so, is guilty of such contributory negligence as precludes him from a recovery if he is injured," although the crossing was supplied with a flagman, and the flagman did not give notice of the approach of danger. A person attempting to cross should not have the right to assume from that circumstance that no danger existed, and enter upon the railroad track without looking. Had the flagman done anything to induce the appellant to attempt the crossing at the time she was hurt, or anything to throw her off her guard, then the question of her negligence would have been a question for the jury. This question was also before the Supreme Court of Wisconsin in the case of *Hansen v. Railway Co.*, 83 Wis. 631, (53 N. W. 909,) and it was there held that where plaintiff's intestate started to cross defendant's track a short distance in front of an engine, and was killed, and if he had looked before attempting to cross he could have seen the engine approaching, he was guilty of such contributory negligence as to prevent a recovery. And in the case of *Sala v. Railway Co.*, 85 Iowa, 678, (52 N. W. 664,) it was held that under chapter 104 of the Acts of the 20th General Assembly, requiring a steam whistle to be twice sharply sounded by a locomotive engine at least sixty rods before a highway crossing is reached, and that, after the sounding of the whistle, the bell shall be rung continuously until the crossing is passed, and providing that the railroad company shall be liable for all damages which shall be sustained by any person by reason of such neglect, the omission of such duty will not render a railroad company liable in damages for personal injuries sustained at a rail-

road crossing without regard to the negligence of the person injured. It was also held by the Supreme Court of Minnesota, in the case of *Magner v. Truesdale*, 53 Minn. 436, (55 N. W. 607,) that "one attempting to cross a railroad track at a street crossing without looking to see if there is danger, when there is nothing to prevent his looking, and when, by looking, he must have discovered the danger in time to avert it, is guilty of negligence."

These are the rulings of some of our sister states upon the question of contributory negligence, but we need not go beyond the limits of our own state to find the rulings which clearly and distinctly define the effect of contributory negligence upon a claim asserted for damages on account of injuries received by reason of the negligence of another party. So, in the case of *Gerity's Adm'r v. Haley*, 29 W. Va. 98, (11 S. E. 901,) this Court held that, "where negligence is the ground of an action, it rests upon the plaintiff to trace the fault of his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if, from these circumstances so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence was fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and, on the plaintiff's evidence alone, the jury should find for the defendant." Again, in the case of *Beyel v. Railroad Co.*, 34 W. Va. 538, (12 S. E. 532,) which may be regarded as a leading case upon this question in this state, the syllabus reads as follows: "Failure to ring a bell or blow a whistle on an engine, as required by the Code, c. 54, s. 61, is negligence for which a railroad company is chargeable; but this does not excuse a traveler on a highway crossing a railroad track from the exercise of such reasonable care and caution as the law requires to ascertain whether a train is approaching the crossing. (2) The traveler and the company have mutual and reciprocal duties and obligations in such case, and, though a train has the right of way, the same degree of care and diligence to avoid collision is due from both. (3) It is the duty of a traveler on the highway crossing a railroad to look carefully for an approaching train, and if looking leaves any doubt, or the view is obstructed, he must also listen before attempting

to cross; otherwise he will himself be guilty of negligence which will prevent his recovery for an injury received in crossing. Obstructions rendering the view obscure and unreliable call for greater caution on his part."

Now the plaintiff's own testimony shows that his eyesight and hearing were good, that there was no noise to prevent his hearing, no obstruction to prevent his seeing the train returning if he had only taken the precaution to look; and we must conclude that he was lulled into security by the fact that the train had passed and he did not anticipate its immediate return, and that, without using the least precaution, he walked heedlessly onto the track in front of the approaching train. Under these circumstances, notwithstanding the agents of the railroad may have been guilty of negligence in not ringing the bell and blowing the whistle, in the light of the authorities above quoted, my conclusion is that the plaintiff was guilty of such contributory negligence in this case as precludes his recovery.

The judgment complained of is reversed, and this Court, proceeding to render such judgment as should have been rendered, gives judgment for the defendant upon the demurrer to the evidence, with costs.

Reversed.

CHARLESTON.

DAVIS v. SETTLE *et al.*

(BRANNON, JUDGE, *dissenting*).

Submitted September 17, 1896—Decided December 19, 1896.

1. CONSTRUCTIVE TRUSTS—*Adverse Possession—Trustees.*

Where a person having an inequitable paper title to a tract of land, and out of possession thereof, with full knowledge of another's superior equitable title, by any means obtains the superior legal title, which rightfully belongs to the holder of the equitable title, and possession thereunder, so as to prevent the rightful acquirement thereof by the holder of the equitable title, and thus bars his suit at law for the possession of the land, equity will hold such person a trustee of the legal

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title for the benefit of such holder of the equitable title; the acquirement of the legal title under such circumstances being regarded as constructively fraudulent. (p. 22.)

2. CONSTRUCTIVE TRUSTS—*Quieting Title—Trustees.*

Where a holder of the equitable title to a tract of land has the right to have his deed reformed by his remote grantors, so as to cover such tract of land, and others claiming adverse inequitable title to the same land from the same grantors, with full knowledge of the outstanding equity, by judicious management contrive, in fraud of the rights of the equitable holder, to perfect their inequitable title in such way as to prevent the correction of such deed in such manner by their common grantor, such others will be held as trustees of the legal title, and compelled to convey the same to the holder of the equitable title. (p. 23.)

3. CO-TENANCY—*Seisin.*

Common seisin in fact or law, without regard to source of title, creates co-tenancy. (p. 24.)

4. CO-TENANCY—*Co-Tenancy Possession—Adverse Possession,*

Where a person claiming an inferior paper title to land held by co-tenants under a superior possessory title obtains possession of the land by any device from the co-tenant in actual occupancy thereof, without the knowledge of the other co-tenants, his entry will be held to have been under the co-tenancy possession, and not under his adverse paper title, and to so continue until perfect disseisin of the other co-tenants, either presumed from lapse of time or some notorious act of adversary possession, or disseisin brought home to the knowledge of the other co-tenants. The burden of establishing such perfect disseisin is on the person alleging it. (p. 28.)

5. EQUITY JURISDICTION—*Partition—Quieting Title.*

Section 1, chapter 79, Code 1891, authorizes a court of equity in partition cases to pass on all questions of law touching the legal title of any one claiming to share in the partition to the interest he claims, if his interest be such as, if valid, will make him a co-owner in the common subject with the plaintiff as holding under the same right or title under which the partition is to be made; but it does not authorize the court to pass on the title of a stranger claiming under a different title, adverse to the title under which the partition is to be made; nor can such stranger and his hostile title be brought into such suit, and the conflict between the two hostile rights settled as incident to partition. (p. 30.)

6. EQUITY JURISDICTION—*Trial by Jury—Constitutional Law.*

In matters of such nature as give right to trial by jury under the Constitution, the legislature cannot give equity jurisdiction over them, and deprive the party of right of trial by jury against his protest. (p. 32.)

7. EQUITY JURISDICTION—*Trial by Jury—Constitutional Law.*

Where already, at the time of the adoption of the Constitution, equity exercised jurisdiction in a certain matter, the provision of the Constitution guaranteeing trial by jury does not relate to or give right to trial by jury in suits in equity involving such matter. (p. 34.)

8. EQUITY JURISDICTION—*Quieting Title—Possession.*

Equity has no jurisdiction, upon the sole ground of removal of cloud from title, to try conflicting titles to lands, at the suit of one holding either legal or equitable title, the adverse claimant being in actual possession. (p. 36.)

9. CHAMPERTY.

Where a contract is affected with champerty, only the party to it, and not a stranger, can make that defense against it. (pp. 25, 40.)

10. DEPOSITIONS—*Notice—Defective Notice.*

A notice to take depositions is not bad because it specifies the county in which the depositions are to be taken, or in which the suit is pending, but does not specify the state. (p. 42.)

Appeal from Circuit Court, Fayette county.

Bill by James W. Davis against H. M. Settle, the Rush Run Coal & Coke Company, and others for partition, and to determine complainant's rights in land. From a decree for plaintiff, the defendant coke company appeals, and certain of the appellees cross-assign errors.

Reversed in part, and modified.

ST. CLAIR & GAINES and BROWN, JACKSON & KNIGHT, for appellant.

J. W. DAVIS, L. L. LEWIS, J. W. HARRIS, and R. F. DENNIS, for appellees.

DENT, JUDGE:

This is a chancery suit, instituted by James W. Davis against H. M. Settle *et al.*, in the Circuit Court of Fayette county. The facts of the case are as follows: Both parties claim under Sarah Stuart. In September, 1837, Seth Huse purchased from Sarah Stuart, by written agreement, out of a large tract "fifty acres of land, on New river, including the upper improvement, that John Scott has in possession." Huse sold Settle this fifty acres in 1845 by writing, providing that, when the purchase money should be paid, Huse should convey or cause to be conveyed, to Settle. The agreement between Huse and Stuart was a

mere executory agreement, not under seal, and provided that Huse might take in more land at fifty cents per acre. Sarah Stuart, by will devised her lands to her children, and empowered Samuel Price, her executor, "to convey any lands that may be sold at the time of my death." The lands were partitioned, and a five thousand eighty-three and a half acre tract was assigned to Agnes Peyton, in which was included the "Harrison Settle fifty acres," on New river, so marked on the plat of partition. Agnes Peyton and her trustees sold and conveyed this land, according to the plat, to A. A. Low, April 22, 1874, excluding on the face of the deed the Harrison Settle fifty acres. Huse and Harrison Settle had been in actual possession of the land since the year 1837, and Settle was in possession thereof at the time Low purchased and continued thereon until a short time before the institution of this suit. April 3, 1874, Samuel Price, as empowered by the will of Sarah Stuart, executed a deed to Settle for fifty acres, by metes and bounds, but which did not include the thirty acres now in controversy, and which Settle was then in possession of, as the Huse land. The deed was not delivered to Settle until March 5, 1878, when Huse gave it to him, taking his receipt therefor on his bond, in words as follows: "Rec'd of Harlow Huse, Samuel Price's executor's deed for the within-described land, this 5th March, 1878." It was recorded March 28, 1878. Afterwards, when Low claimed the land in controversy as not covered by Settle's deed, Settle refused to give it up, and claimed the boundaries of the deed were wrong, and that he was entitled to the land, as shown on the partition map, as bounded by New river, and of which he had been in possession. Low brought an ejectment suit against him, and the plaintiff, Davis, agreed to defend suit and pay the costs, in consideration of one-half the recovery. This agreement was reduced to writing, and duly recorded, as required by law. The suit was twice tried and each time resulted in a verdict in favor of Low. Settle appealed, and this Court reversed the case both times; the last time holding that Low's deed did not cover the disputed land, and that Samuel Price's deed was void, in so far as it conveyed other land to Settle in lieu of that in suit, thus virtually determining the case against Low. 9

S. E. 922. In the meantime, Low had leased his land, or a part thereof, including the disputed tract to the defendant, the Rush Run Coal Company. Settle was still in adverse possession thereof. On the 3rd day of September, 1888, the Rush Run Coal & Coke Company, Low's tenant, with full notice of Davis' claim to half this land, both actual and constructive, obtained from Harrison Settle a deed purporting to convey to it the fifty acres deeded to him by Samuel Price, including within its boundaries the part thereof that had been disclaimed by Settle in the case of Low against him, and containing this recital: "It being the intention of the party of the first part to convey only such land as he now owns on the south side of the river within the lands of A. A. Low." Having thus parted with his whole interest, he surrendered possession of the land in controversy, and the Rush Run Coal & Coke Company took possession thereof, as they now claim, as the tenant of A. A. Low. Low, having thus obtained possession of the land through his tenant, dismissed his action. Plaintiff, learning of this, and on the 30th day of September, 1889, having obtained a deed according to his title bond, instituted this suit to know just how he stood, and have partition of the land between himself and the person appearing entitled thereto.

In the suit of A. A. Low against Settle, this Court held that Samuel Price had erroneously executed his power as executor of the will of Sarah Stuart. Such being the case, having once executed the power, though erroneously, he never could correct it, as the deed had been delivered, and admitted to record, and the only way his mistake could be corrected was by the interference of a court of equity, and then only as against those having full notice thereof. When the deed passed out of his hands into the hands of Settle, Low already had his deed, and he knew just where the Huse land lay, that Settle had in actual possession. Hence he made his purchase with full knowledge of Settle's rights as to said land, but when he discovered afterwards that the Price deed did not cover the land in controversy, in February 1881, he began his ejectment proceedings. Settle, being in full possession of the land at this time, and until he surrendered possession, had the right to file his bill in equity to reform his deed in accord-

ance with his possession, and prevent Low's deed from becoming a cloud thereon. It is conceded that the land included in the Price deed and that in controversy unquestionably belonged to Low and Settle, and no others were interested therein. Now the only other persons interested are the Rush Run Coal & Coke Company and the plaintiff, Davis. And there can be no question that Settle has no longer any interest in this controversy, for, when he made the deed to the Rush Run Coal & Coke Company, it is plain from the deed that he intended to sell only and all lands owned by him within the boundary covered by Low's lands. The word "only" was used, not only to show that he did not intend to convey the lands formerly disclaimed by him within the boundary, but as a reservation of the Davis interest, and also to indicate that he parted with his possessory title under the Huse purchase, including all interest, of every kind and character, within the Low boundary. It is plain to be seen that the object of this purchase was not the fifty acres covered by the Price deed, so much as it was to obtain the possessory title of Settle in the Huse land, and thus divest Davis of any title thereto except equitable, and prevent him holding the same against Low, compelling him to sue at law, and then defeat him by a complete chain of title on Low's part and a want of title on his part. Both Low and the Rush Run Coal & Coke Company had constructive and actual notice of Davis' rights. In 1 Perry, Trusts, § 223, the law is stated: "If in any way a person purchases with what the law construes to be full notice that another has a legal or equitable title to the property, or that he has been deprived of his interest by accident, mistake, or fraud, he will be held as a trustee." The Rush Run Coal & Coke Company is the tenant of Low, and all its purchases of outstanding title to Low's land inure to the latter's benefit, with or without the consent of such tenant, while the tenancy continues. Settle's equity to the land in controversy was superior to Low's, also was Davis' equity, he having acquired from Settle. Settle's possessory title was also superior to Low's, but Low's tenant, who must be considered Low's agent for the purpose, obtained Settle's possessory title, to the benefit of which Davis was entitled, of which Low had full notice, by purchasing all of Settle's

interest as aforesaid. Hence both the agent and principal should be held as trustees of such possessory title for the benefit of the plaintiff, whom they have defrauded by purchase from Settle. It is true the tenant did not effect the transfer of the possessory title by the open and direct purchase thereof, but accomplished its purpose just as effectively by the indirect purchase, so that it concealed its object, that every one that runs might not read. Together the landlord and tenant have managed to outwit justice so far as a legal forum is concerned, for they have the necessary title papers to cover the land. The landlord can say, "I have title to the whole land, except Harrison Settle's 50 acres, excluded in my deed." The tenant can say, "I have a deed from Harrison Settle for his 50 acres." Both titles are complete. Is not this a plain case for the interference of a court of equity, especially when its purpose is to circumvent the adjudications of such court, and defeat what it has determined to be justice?

There is still a further ground for equitable interposition. When Davis acquired his right from Settle, he acquired along with it the right to have the Price deed so reformed as to cover the land in dispute, to at least the extent of his moiety thereof, except as against purchasers for value, without notice. The tenant, by its deed, has acquired thirty acres of land, which properly belonged to Low, and which Settle disclaimed, and has never owned, though the legal title was in him by clear misunderstanding. Settle wanted to surrender this land, and hold the thirty acres, which rightly belonged to him. But Low wanted to make the trade because the Huse thirty acres was the more desirable. Now, the tenant having purchased with full notice of the rights of Settle and Davis, although it has acquired the right, if acting in good faith, to have the Price deed reformed so as to cover the Huse thirty acres, but as it has leased from Low this same thirty acres (on what terms is not disclosed), it is willing to yield its rights if not legally compelled to, and let Low hold the same under his deed. Thus are they together in possession of the land to which plaintiff is entitled, with title papers fully covering the same, while the plaintiff has a superior equitable title, of which they

had full notice when they acquired complete legal title thereto; hence they must be held as trustees in so far as plaintiff's rights are concerned. By their conjunctive acts, the defendants have debarred the plaintiff from seeking relief from the representatives of Mrs. Stuart's estate, and equity will require them to grant him the relief which but for their collusion he might have had from others. By the adverse decision by this Court as to Low's deed, covering the land in controversy, which was a virtual determination of the suit, although still pending, the statutory bar of ten years rendered Settle's adverse possessory title indefeasible. The pendency of such suit only stayed the running of the statute as to such suit, and not as to any other proceedings. And on its dismissal by the plaintiff Low therein, in so far as the plaintiff Davis is concerned, it must be considered as though it had never been brought; thus leaving the landlord, by reason of the purchase thereof by his tenant, in full investment of Settle's indefeasible title, subject to Davis' equitable rights therein.

Equity jurisdiction is so plain on the grounds aforesaid that it is hardly necessary to discuss the question of possession. But even on this question, from the pleadings and proofs, the law is clearly with the plaintiff. Co-tenancy is a question of possession entirely, without regard to title. The law presumes that possession is under title papers, unless such presumption is destroyed by the facts and circumstances established to exist by the evidence. Settle owned the land in controversy by color of title, rendered indefeasible by actual adversary possession as to Low for a period of more than ten years, acquiesced in by those under whom he claimed. The purchase money was fully paid, and actual occupancy, even if the Huse title bond was indefinite, satisfied the statute of frauds, and estopped his vendors from denying his right to the land so held by him. In addition thereto, they had it platted off to him in making the partition, and under which Low purchased. For some reason not thoroughly apparent, Price made him a deed for fifty acres, including therein thirty acres of land which belonged to Mrs. Peyton (afterwards Low), and not including the land which he was actually occupying, and on which his house and improvements

were situated. It is claimed that this was done at Settle's instance. Settle never received his deed until 1878, long after Low had his deed, and had gone into possession of his land, with full notice of Settle's occupancy and claim. While he received the deed, Settle claimed that he did not know but what it covered his land; and he would not accept or take possession of the Low thirty acres, or move his buildings thereon, but positively and continuously refused to do so. Low, finding out the condition of affairs, determined to compel Settle to take his thirty acres included in the deed, in exchange for the thirty that in reality belonged to Settle. For this purpose, instead of offering to correct the mistake, or instituting a chancery suit to reform Settle's Price deed as a cloud on his title, he brought his action of ejectment. For almost ten years it was carried on, and Settle, to prevent Low from succeeding, was compelled to sell one-half of the land to the plaintiff, to enable him to defend his possession. This is called "champerty." If it is so, it is honest champerty, such as a court of equity will not avoid at the instance of the person who was the unjust cause thereof.

Champerty is a species of maintenance, and, while maintenance has not been directly abolished by statutory enactment, it has been so indirectly encroached upon as to render it almost obsolete. At common law, maintenance is said to be an officious intermeddling in a suit that in no way belongs to the meddler, and signifies an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right. Champerty is the unlawful maintenance of a suit in consideration of a part of the matter in controversy. The reason of the law was that maintenance tended to suppress justice and truth, work delay, and stir up strife, and all maintenance of a suit by a stranger was at common law unlawful, and was considered *malum in se*, as it permitted the wealthy to oppress the poor, and rob them of their small inheritances. No mere chose in action was assignable. Now, almost any cause of action is transferable; and attorneys are permitted to take any case on a contingent fee, and nothing can be considered maintenance the end whereof is justice, but only such conduct as is malicious or oppressive in its nature. An attorney who takes advantage of the circumstances of

his client, and, under the pretence of charging him a fee, defrauds him of his property, or one who, to vent his private malice, upholds an unjust cause, in which he has no interest, would probably be regarded guilty of maintenance, and, at the instance of the client in the former case, the contract would be avoided. The right to purchase a lawsuit is not now denied. The plaintiff would have had the right to have purchased Settle's entire interest, and to have carried on the litigation to finality for himself. Why not, then, purchase a half interest contingent on the result? This Court, at least, will not hold it to be maintenance of an unjust cause which it has already decided to be just. While the court will prevent its officers from being oppressive toward their clients, it will also protect them against the manipulations of those who seek to evade the force and effect of its decisions, and thus deprive the attorney of his earned fee. There should be honesty even among opposing litigants towards the attorneys of their opposers. Attorney's fees should not be less sacred than other obligations, and they should respect each other's rights with regard thereto. Much disrepute has been brought on the profession, not more by the charge of extortionate fees than the disposition on the part of the profession to disparage the services of other members thereof, and to lend their aid to any scheme which will enable others to prevent an attorney from reaping the reward of his labors as a punishment to him for having sustained the cause of an opposing litigant. This does not apply to the management of the present case, but to the conduct of Low and the Rush Run Coal & Coke Company when they undertook to buy out Settle,—that they did not consult his attorney of record, known to them to be personally interested in the litigation, and make their purchase complete. Had they done so, they would have probably been saved much trouble, expense, and mortification. Settle was an ignorant old man, but he knew that the law would not deprive him of the land on which he had resided for so many years. When the ejectment suit had reached such a condition, owing to the holding of this Court, that it was about to be determined against Low, his tenant, the Rush Run Coal & Coke Company, through its president, Effinger, with full notice of plaintiff's rights, as shown by the evidence of Settle,

presumably with Low's consent and knowledge, and undoubtedly for the benefit of the landlord, who accepted thereof, bought out Settle's entire interest, paying, it is true, seemingly a good price therefor, but with its eyes open. The ejectment suit was then dismissed, because, as the answer of Low alleges, Settle "surrendered possession of the land," but not because of the suit. When plaintiff filed his original bill, he did not know just how he stood, but considered himself a co-tenant with whomsoever might own the other half of the land,—Low, Settle, or Low's tenant,—and asked for partition. The answer claimed adverse possession under Low's deed, by virtue of possession surrendered by Settle. If disseised at this time, plaintiff did not know it, and hence the disseisin was not perfect. For the following reason, when Settle sold and surrendered possession, it was the joint possession of himself and plaintiff in co-tenancy, so that Low and his tenant entered into that possession, and became co-tenants with plaintiff. When a person accepts the results, he also adopts the means by which they are attained. Low attempts, in after pleadings, to escape the effects of his admission in his first answer, by claiming that Settle merely abandoned possession, and he entered under his deed. The transaction is too plain to justify any such evasion. The tenant took the possession, and not Low, although for his benefit, and took it direct from Settle. In his first amended bill, plaintiff is still in doubt as to his proper standing, and calls on the defendants for information as to their claims, and finally, in his second amended bill, not appreciating or understanding his true position, charges the defendants with being in forcible possession of the land. They, of course, claim adverse possession under adverse title. This Court, having decided, between the same parties or privies, that Low's deed did not cover this land, will not now permit such decision to be avoided by the act of one of the parties thereto, nor permit Low to claim possession under such deed. *Poole v. Dilworth*, 26 W. Va. 583.

Settle, when he sold, had possession under adverse possessory title superior to Low's paper title. When the tenant entered by reason of its purchase in behalf of its landlord, it entered into the possession of Settle under his possessory title; and thereby both the tenant and landlord,

as to such possession, became co-tenants with plaintiff. And the possessory title, while ordinarily it would be merged into the paper title of those in possession, will not be so done to the injury of one entitled to the benefit thereof, nor in avoidance of an adjudication of this Court. A person out of possession, holding an inferior paper title, cannot buy out a co-tenant in actual possession to the detriment of the other co-tenants, and then claim to enter under his inferior title adversely to them; but he will be held to have entered into and hold under the co-tenancy possession, until actual perfect disseisin of them, by presumption from lapse of time, or as is said in the case of *Pillow v. Improvement Co.* (Va.) 23 S. E. 32, by "a clear, positive, and continued disclaimer of title and adverse right, brought home to the knowledge of the other co-parceners." In that case it was held that, to make constructive possession under an adverse title amount to perfect disseisin in favor of those entering under the co-tenancy possession, it must have continued the statutory period of ten years. It is different, however, if the possession is not under the co-tenancy, but is entirely independent thereof. Every presumption is in favor of the co-tenancy if it once existed, and it devolves on him alleging to prove perfect disseisin, or nonentry under such possession. It has not been done in this case, as no actual knowledge of or claim of disseisin was brought home to the plaintiff until after the institution of his suit. A co-parcener cannot be disseised without his knowing it until lapse of time raises a presumption against him which he is unable to explain or rebut; so that the tenant and landlord together must be regarded as the co-tenants of the plaintiff, for they have failed to establish perfect disseisin. Nor do they claim to be purchasers for value without notice, but, with full knowledge, they took the risk of plaintiff's claim, and entered on the land, and improved the same. They, therefore, cannot be protected as innocent purchasers for value, without notice, although they may have sincerely believed that they would be able to defeat the plaintiff of his right to recover in any suit instituted by him. For this reason, they are not entitled to any allowance for their improvements. Settle has no interest in this land or controversy, having parted with the same to the Rush Run Coal & Coke Company, and its land-

lord, Low; and the circuit court erred in decreeing in his favor. His half of the land should have been allotted to his vendee and its beneficiary, as parties in co-interest in this controversy. According to the pleadings, he has the fee, and it is the lease or possession which belongs to both. This is a matter between them, as their interests in this suit and the land appear to be mutual and identical. As these are the only questions involved in the rehearing, reference is made to the opinion of Judge BRANNON, where all other questions are fully discussed and determined. This opinion, being written concerning points only about which the court disagree, is not intended to cover the whole case.

The decree will be reversed in so far as it adjudges Harrison Settle one-half the land in controversy, and amended so as to allot the same to the heirs of A. A. Low and the Rush Run Coal & Coke Company, and in all other respects affirmed, with costs to the appellee Davis, as the party substantially prevailing.

BRANNON, JUDGE, *dissenting*:

The first point made by appellant's counsel is that equity has no jurisdiction, as the claim of Davis to the land and that of Low and the coal company are adversary and hostile to each other, not in privity, and that, where such is the case, even in cases of partition chancery has no jurisdiction; that before the passage of section 1, chapter 124, Code 1849, as established in such cases as *Straughan v.*

Wright, 4 Rand. 495, equity could not grant partition where the legal title was not clear and conceded; and that that statute did not so far modify that rule as to allow under the guise of a bill for partition, a suit in equity to try adverse titles, but only in cases where the controversy was limited to the parties claiming as joint tenants, tenants in common, or co-parceners, and concerning only the common title under which all held; and upon this question the brief of counsel for appellant contains an able and valuable collation and discussion of Virginia and West Virginia cases.

Up to the enactment of the Virginia Code of 1849, it was settled law that partition was a matter of right in equity, if the plaintiff's title was admitted or clear; but if denied, or dependent on doubtful questions of law or fact,

equity would either dismiss the case, or suspend action until the parties should, by proper action at law, test the legal title. This was because the law court was the proper forum to try, by jury, title to land. But the Code of 1849, in section 1, chapter 124, provided that courts of equity might take jurisdiction in partition, and, in its exercise, "take cognizance of all questions of law affecting the legal title that may arise in any proceeding." Such is our Code, in section 1, chapter 79. All concede that this legislation wrought a change, but how far is the question. Broad as is this language, and broad as is the language of the syllabus in *Moore v. Harper*, 27 W. Va. 362, that in partition cognizance may be taken by courts of equity of "all questions of law affecting the legal title that may arise in the proceeding, such as removing a cloud from the title, or passing upon an adverse claim," I am not of opinion that either means to transfer from the law court into equity the title of a total stranger to the party asking partition,—a title foreign and hostile to the title under which the plaintiff claims; a different title. For instance, a number of heirs of a dead man, suing for partition of his lands among themselves, could not bring into that suit one not an heir, nor claiming the share of an heir, but claiming a title distinct from that of their father, and hostile to it, because it covered a part or all of their land. I can see that it would be desirable to do so, for the reason that, if they have partition without settling that adverse claim, it may be found years later to be valid, and take the land of one of the parceners, and that parcener would have to ask the others to give him land to make up his lost share, when that could not be done, because of sales to *bona fide* purchasers for value. Still, I have no idea that these parceners can bring this stranger into their partition suit, and there try his title, because there is no privity, but only hostility, between them, and it would make the suit multifarious, as bringing into their suit a man and matter distinct from their rights as among themselves involved in the suit. Worse still, it would deprive that man of his constitutional right to have his freehold estate in land tried by a jury. I see that in laying down broadly the power of equity in partition cases to pass on questions of title under the statute, in *Hudson v. Putney*, 14 W. Va. 561, the Court

says that courts of equity must observe the general rules of practice in equity for the purpose of ascertaining facts by a jury or otherwise, as may be most proper, thus contemplating a jury trial on the question of title; and, if I could see that a court of equity possessed power to have a jury in such a case, I might be more inclined to give the statute so broad a construction, though still I would not think it was intended to bring into a suit for partition adverse titles held by total strangers. But I find that Code c, 131 s. 4, prohibits a chancery court from directing an issue except where there is conflict in evidence; and section 5 of chapter 131, giving power to a court to have an issue tried or an inquiry of damages made by a jury, is in words limited to law cases, and section 8, chapter 121, is confined to motions; and I know of no statute authorizing such a land trial by jury in equity. Could it, however, direct an issue on the title, as under old practice it has done where there is conflict of evidence? I am doubtful as to this. So I do not think the stranger's adverse title can be brought into a suit in equity for partition. But the statute made some change, 'as all concede. What change? Just enough to enable courts of equity, in proper partition cases, to do what they could not do before the statute; that is, pass on the legal right of any one claiming participation in the common subject, and, in doing so, to inquire into all questions touching his legal title to the share claimed by him,—to inquire into that claim or title which, if valid, would entitle him to share in the farm; not to examine title of a stranger who could not come into the partition, even though his title be found valid. The person thus brought in, and compelled to submit his title to equity hearing, must be one having himself a share in the farm, or some one claiming under one who had a share with the plaintiff. In other words, the suit must be a suit for partition of the farm among those who own it,—a partition suit; and in it the court can determine all manner of questions bearing on the right of the parties claiming under the same title to shares in it. One of the several co-parceners may have sold his share to several contesting parties. He may have had it sold from him by creditors. In many ways there may be contesting claims as to his interest, depending on doubtful questions

of law and fact. The question arises, to whom shall that share be allotted? Before the act, chancery could not go on with the case, and the parties had to go into a law court to test the matter of who is entitled to that share; but, under the act, equity can now do this. That was the lameness in equity which the statute was aimed to cure,—the evil to be remedied. Never was it designed to make an ejectment out of a partition suit to the extent of trying separate titles, without relation or kinship to each other. If a cloud, by adverse title, hangs over the common property, which may, after partition, take the share allotted to one, and disarrange the partition, the joint owners must be prudent to sue their adversary, and settle his title before making partition; for they have no right to bring him into chancery, and rob him of trial by jury, in violation of that provision of *Magna Charta* incorporated in our bill of rights: "In suits at common law, where the value in controversy exceeds twenty dollars, exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved." Const. art. III, Sec. 13. Such is the construction of this statute in Virginia given, without discussion, in the late case of *Pillow v. Improvement Co.*, (Va.) 23 S. E. 32, holding that defendant cannot defeat plaintiff's right to have his legal right settled in a suit for partition by merely denying plaintiff's right to partition, and holding adversely to him, where defendant's grantor was a co-parcener with the plaintiff. But that case repudiates the broader construction that anybody holding any adversary title may be forced to submit his right to adjudication in equity.

Even under the construction of the statute here given, it may be said, not without some force, that the said clause of the constitution is broken when we bring into equity a party, and try his legal right to a share in the farm by a chancellor, instead of a jury, although he did derive his right from one who claimed that share as co-parcener. He says he claims a freehold estate in land, and if there is any instance where, next to a trial of life or liberty, a man is entitled to a jury, it is where one is to be deprived of his land,—his home. Confessedly, before the statute, equity could not try his title. He could be deprived of his freehold only by a judgment of his peers;

and can the legislature, by thus widening the jurisdiction of equity, and enabling it to try without jury what before it could not, take from him his right to a jury? In *Tillmes v. Marsh*, 67 Pa. St. 508, it is asserted that an act of assembly transferring any part of the jurisdiction of the common-law courts to a court of chancery would be unconstitutional. *Coal Co. v. Snorden*, 42 Pa. St. 488, holds that jurisdiction in equity cannot, under statutory amendments or proceedings, be extended by legislation to embrace matters which, at the adoption of the constitution, were common-law rights, and within the exclusive jurisdiction of common-law courts, so as to cut off trial by jury. See that case in 82 Am. Dec. 530, and note. In *Tabor v Cook*, 15 Mich. 322, it is held that an act giving right to file a bill to quiet title would be unconstitutional as applied to one in possession; that as, in civil cases at law, provision was made for jury trial, but none in chancery, except in special cases of issues out of chancery, merely to satisfy and guide the conscience of the court, a provision for trial of a case in the nature of ejectment, without provisions for a jury, would be void. This doctrine is clearly asserted in *Donahue v. Meister*, 88 Cal. 121, (25 Pac. 1096). See *Appeal of Frisbee*, 88 Pa. St. 144; *Appeal of Barclay*, 93. Pa. St. 50. This principle seems plain, the difficulty lying in its application. It is not so easy to see that the statute, even under the limited construction here given it, is not repugnant to the constitution, because, if we give it any effect, it must bring to trial by the chancellor alone rights which before its passage were only triable at law. But we must not hold an act unconstitutional unless it is so plainly so that no escape is left. The Virginia supreme court, in *Pillow v. Improvement Co.*, 23 S. E. 32, has held the statute, so construed, constitutional.

The well settled principal is that as equity proceeds without jury, where any subject was within its jurisdiction at the time of the adoption of the constitution giving jury right, the guaranty of jury trial in the constitution will not apply to equity cases. To do this would emasculate the vigor and utility of equity jurisdiction. The makers of the constitution, well aware that equity exercised an immense jurisdiction without jury, not only did not

abolish it, or provide for jury trials in such courts, but expressly retained such courts, with plain intent that they should go on wielding their powers according to the practice of centuries, without jury trial. In the clause guarantying jury trial, they used the limiting words "in suits at common-law." This does not mean that a matter in which right to the jury had existed before the constitution may, by legislation, be transferred to a court of equity, and the party deprived of a jury, merely because it does not arise in an action at law, but it refers to matters before the constitution triable by jury. Opinion in *Barlow v. Daniels*, 25 W. Va. 512. But this limitation in the language of the guaranty does not mean that in every trial of property there shall be a jury, though dependent on fact. It means that the jury right shall apply only in those matters or instances in which at the date of the adoption of the constitution, the right to demand a jury existed, not in those matters which up to that date fell within the known jurisdiction of equity jurisprudence. Opinion in *Barlow v. Daniels*, 25 W. Va. 512; Sedgw. St. & Const. Law, note 486. See note, page 188, to *Steamboat Co. v. Roberts*, 48 Am. Dec. 178. This note is a learned and elaborate discussion of the jury right in all its phases. Now, when West Virginia was formed, and when both her Constitutions were adopted, this statute giving equity courts power in partition to pass on legal title was in force, and thus courts of equity at that date exercised this power, and these Constitutions did not abolish it. True, before that statute the Virginia bill of rights of 1776 and the constitution of 1830 contained this guaranty: but the Virginia court in *Pillow v. Improvement Co.*, 23 S. E. 32, did not regard that fact as material, but said that as, since the enactment of the statute of 1849, the constitution of 1851 was adopted, and this power was exercised in equity under the act before that constitution, it was not unconstitutional. So, though for more than a century there has not been a moment of time when this guaranty of jury trial was not in our constitutional law, still, as the statute antedates the formation of this state, we can say that, before our Constitution was adopted, it was an acknowledged power of a court of equity. I suppose it enough to say it existed at the adoption of the present Constitution, and

the presence of the jury clause in prior Constitutions is not controlling. For this reason, if for no other, the statute is valid.

Then, construing the statute as above indicated, has this case shelter in a court of equity under the head of partition? I do not think it has. True, as against Settle, Davis shows right to partition; but he brings in Low and the coal company. The bill does show that the plaintiff was entitled to half the tract conveyed by Settle to him, leaving Settle owner of the other, and states in a very obscure way that Low and Settle claim an interest, and that the coal company claims an undivided half, and then states that they may be entitled to Settle's half, and calls on them to say. I suppose, as deriving this half from Settle, they would be tenants in common with Davis, and properly in court for partition, and any kind of controversy as to the right of Low and the company could be settled. Davis would have right to have a partition binding on all, and not a partition binding only on Settle. So far Low and the company are properly parties. But the answer of the coal company repudiates ownership in itself of the land in which Davis has an interest, and claims only as tenant of Low. This ends the matter of partition as to the company, based on the idea that it is co-owner with Davis by right derived from Settle by said deed. The tract conveyed by Settle to the company is a different tract from that claimed by Davis. Davis' bill so asserts. Next as to Low: Low's answer repudiates any ownership derived under Settle, and sets up a right derived by deed from the trustees of Agnes Peyton and Mrs. P. This right in Low gives no part ownership in the Settle land to enable us to say Low owned part, and Davis part, but, if anything, gives Low the entirety. It has no kinship with Davis' claim further than the two claims are to land originally vested in Sarah Stuart, she having sold fifty acres to Huse, and Huse to Settle, and Settle half of it to Davis; while a large tract came to Mrs. Peyton, as child of Sarah Stuart, and was by her conveyed entirely to Low. It is a hostile claim. There is not a shadow of community of interest between Low and Davis. In truth, the plaintiff's amended bill shows an adverse title. It says that any pretense of claim by the coal company or Low, under

the Peyton deed to Low, to the Settle land, claimed by Davis, is unfounded, because that was excepted from it. Instead of showing, as a partition bill must, a common title, a community of interest, it calls on the company to show its claims, under its deed from Settle, for the land conveyed by Price to Settle, and by him to the Company, or otherwise, and to say whether under or against the Settle title. Its construction as a whole shows no community, but hostility, of interest and claim. The fact of hostile claim by defendant speaks out on reading the bills. The amended bill alleges two actions of ejectment between the two, as hostile titles. What equity exists between Davis and Low or the company? No equity arising out of community of interest. Where two own land, there is an equity between them, giving right to partition. Right to partition pre-supposes a community of interest in the estate, else there is no right to partition. The defendants do not claim as joint owners with plaintiff, nor under any one who was joint owner with him, or with any under whom he claims. With whom were these defendants ever joint owners? There never was a common seisin between them and any one else. They claimed and entered, claiming an entirety.

Though jurisdiction cannot be sustained under partition, can it be sustained under that head of equity jurisdiction exercised to remove cloud over title? The bill is not framed with that view. It is sought to be sustained as a suit for partition, praying only for that, although in all its features and in its entire cast it sets up two hostile claims of title. It does not set up matter to bring it under the jurisdiction of equity to remove cloud from title to realty. It lacks an allegation indispensable to bring it under this head. It does not say that the plaintiff is in possession, and ask the court to remove a cloud, but says the defendant company is in actual possession. Equity will not try conflicting titles to land, unless it is incidental in administering relief, under some known head of equity jurisdiction: and, to bring a suit under the known head of jurisdiction to remove cloud from title, the plaintiff must be in possession, for, if not in possession, he may sue at law in ejectment. That equity will not settle title or bounds of land between adverse claimants is settled by

a multitude of cases. *Stead v. Baker*, 13 Gratt. 380; *Stuart v. Coalter*, 4 Rand. (Va.) 74; *Lange v. Jones*, 5 Leigh, 192; *Hill v. Procter*, 10 W. Va. 59; *Cresap v. Kemble*, 26 W. Va. 603. Equity has a distinctive jurisdiction to remove cloud from title to land in certain cases, in and of itself, independent of other grounds for jurisdiction. Story, Eq. Jur. §§ 694, 699, 700; 2 Am. & Eng. Enc. Law, 298; *Appeal of Dull*, 113 Pa. St. 510, (6 Atl. 540); 3 Pom. Eq. Jur. § 1398; note to *Helden v. Helden* (Md.) 45 Am. St. 374, (31 Atl. 506); *DeCamp v. Carnahan*, 26 W. Va. 839. That, to give a party jurisdiction in equity based alone on the ground that it is a suit to remove cloud from title, he must be in possession, and the bill so allege, see *Christian v. Vance*, 41 W. Va. 754 (24 S. E. 596); *Clayton v. Barr*, 34 W. Va. 290 (12 S. E. 704); *Helden v. Helden* (Md.) 45 Am. St. 371, 375, (31 Atl. 506), and United States cases just below. The plaintiff's bills show only equitable title in him. Under decisions of the United States Supreme Court, that, too, is a bar against this suit, as one to remove cloud. In *Frost v. Spitley*, 121 U. S. 552, (7 Sup. Ct. 1129), Justice Gray, delivering the unanimous opinion of the court, says: "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. *Alexander v. Pendleton*, 8 Cranch, 462; *Peirsoll v. Elliott*, 6 Pet. 95; *Orton v. Smith*, 18 How. 263; *Crews v. Bercham*, 1 Black, 352; *Ward v. Chamberlain*, 2 Black, 430. As observed by Mr. Justice Greer in *Orton v. Smith*: 'Those only who have a clear, legal, and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace, or dissipate a cloud on the title.' 18 How. 265. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal his remedy at law, by action or ejectment, is plain, adequate, and complete; and, if his title is equitable, he must acquire the legal title, and then bring ejectment. *U. S. v. Wilson*, 118 U. S. 86, (6 Sup. Ct. 991); *Fussell v.*

Gregg, 113 U. S. 550, (5 Sup. Ct. 631).” Same in *Allen v. Hanks*, 136 U. S. 300, (10 Sup. Ct. 961).

At one time I thought that as the bill alleged no legal title in the plaintiff, and, not being able to maintain ejectment on a merely equitable title, he could sustain this suit as one to remove cloud, though not in possession, being led to that opinion by note to section 1399, 3 Pom. Eq. Jur., and note to *Helden v. Helden* (Md.) 45 Am. St. 376, (31 Atl. 506); but more careful investigation has satisfied me that the law is not there correctly stated. The cases they cite will not support their broad statement, though a good many do contain points in their syllabi that are broad and are well calculated to mislead; but, when scrutinized, the cases will be found to be such as to justify equity jurisdiction by some feature falling under known and acknowledged grounds of jurisdiction, as to enforce a trust for title, or cancel a deed procured by fraud, or the like, some equity subsisting between the parties calling for relief in chancery, but that is not the jurisdiction based on the separate, distinct grounds spoken of above,—that is, removal of cloud over title. As I stated above, chancery will not entertain a suit to settle title or bounds of land, unless it is incidental in administering relief under some known head of jurisdiction. But the exception is as well fixed as the rule. Where there is any equity between the parties to give jurisdiction under a legitimate head, it will try land titles, as it will other matters falling in its way in exercising its legitimate jurisdiction. That is nothing but the old rule stated in *Cresap v. Kemble*, 26 W. Va. 603, “that equity has no jurisdiction to settle title or boundary of land when the party has no equity against the party holding the land.” *Lange v. Jones*, 5 Leigh, 192. He must have an equity against the adverse claimant; no one else will do. *Stuart v. Coalter*, 4 Rand. (Va.) 79. How, then, can one holding only equitable title get relief against one holding adverse claim in possession? He must get legal title, or sue in the name of those under whom he claims having legal title. Davis had adequate relief by ejectment. He could sue in the name of the heirs of Huse’s vendors. I think he could sue in his own name. Why? If the deed from the Peytons to Low did not exclude the Huse land, while it is true the statute did not

run against those who sold to Huse, yet, if they were suing Settle in ejectment, would not a possession of fifty years create the presumption of a grant from them, and thus bar even them? *Hale v. Marshall*, 14 Gratt. 489, 494; *Matthews v. Burton*, 17 Gratt. 312. If it would, it would bar Low, if he sued as a leinee of the Peytons. But if the deed to Low excepted the Huse land, as it did, then against Low, a stranger, that great possession would cover the statutory period five times, and create and vest legal title in Settle, on which Davis could sue anybody in possession. That possession *per se* made legal title. *Garrett v. Ramsey*, 26 W. Va. 345; *Bicknell v. Comstock*, 113 U. S. 150, (5 Sup. Ct. 399); 2 Minor, Inst. 492; Hutch. Land Titles, 237, 238. So I conclude there is no jurisdiction in equity.

I fail to see how the coal company's purchase of Settle can operate to make Low a co-owner with Davis, or give them a common seisin. The coal company was only Low's tenant, not his agent to do this act. In this act it was acting only for itself, so far as we know. How is it possible that its purchase of Settle could operate to suddenly turn Low from a hostile claimant against both Settle and Davis into a co-owner with Davis, so as to give equity jurisdiction? If a tenant can thus affect his landlord, merely because he is tenant, without proof of agency so to do, the rights of the landlord are at the mercy of the tenant. We should not presume an authority of such gravity. To do this is to make Low guilty of fraud in purchasing of Settle with notice of Davis' rights, and so make Low a trustee, as if he held title for Davis, when Settle passed no title to Low, and on this theory erect equity jurisdiction. The coal company, taking title, if it had acquired this land from Settle, could be said to be trustee for Davis, and title be followed into its hands; but why make a trustee of Low when Settle passed no title to him to justify jurisdiction in equity to follow title into his hands? He has nothing to follow. Shall we assume—merely assume—that the coal company really purchased for Low's benefit? It amounts to this: You are a hostile claimant of land, and your adversary sells half to a third party; and then a tenant on your land buys for himself the whole land from your adversary, with notice of his sale to the third party. Instantly, from the mere force of

your tenant's act, you are converted from the character of an adversary to your competitor and his vendee, and are a co-owner with that vendee and a fraudulent purchaser and trustee holding for him; and therefore equity has jurisdiction to entertain the third man's suit for partition on account of your supposed seisin in common with him, and also because you are purchaser of his rights with notice; and equity will follow the title into the tenant's hand, and take it from him, and take your adverse title, too,—the one you held before your tenant bought your old enemy's title. I do not realize the force of this position. This is the basis of equity jurisdiction, as I understand Judge Dent, and not the fact that the claims of all came from a common source, Mrs. Stuart. It is to be added, however, that Settle did not convey to the coal company this tract, in which Davis has taken an interest, but a separate tract, that conveyed by Price to Settle. How, then, could even Settle, much less Low, become co-owner with Davis in other land by reason of such conveyance?

If there were no jurisdiction in equity, it would be proper to decide nothing else; but as the majority holds there is, I shall refer to other points raised in the case, in which I understand other members of the Court to concur.

A second point made by appellant's counsel is that the contract between Stuart and Huse is void for uncertainty. But it has been executed and purged of uncertainty by conveyance from Settle to Davis; and a stranger to it cannot set up its uncertainty. And Low and the coal company, under his right, do not own the land within it, as it was settled in the case of *Low v. Settle*, 32 W. Va. 600, (9 S. E. 922), that the deed from Agnes Peyton to Low did not include the land within that contract. The opinion in that case so states, and because that deed did not include this land, and thus Low had not legal title, a verdict and judgment in his favor were set aside; and so that matter was directly adjudicated, as is logically and unavoidably deducible from the judgment rendered by this Court.

A third point made by appellant's counsel is that the agreement between Davis and Settle is void for champerty. I think it is champertous. But who sets up its vice? The coal company, an utter stranger to it. While Davis could not enforce it against Settle, if Settle resisted, a stranger

cannot set up this defense, as "the taint of champerty only invalidates contracts as between parties to the champerty." 1 Whart. Cont. § 429; *Courtright v. Burns*, 13 Fed. 317, and Judge Thompson's elaborate note, page 323; 3 Am. & Eng. Enc. Law, 86. As will be seen in Judge Thompson's note, this old-time doctrine of champerty is discountenanced and obsolete in many states, and its principles are greatly relaxed. While the common law under which it exists yet keeps it alive here, we should certainly not widen its scope, so as to let third parties avail themselves of it. Settle, the only one prejudiced by it, has waived it by conveying, in pursuance of the contract, to Davis. We cannot cancel it now. 2 Pom. Eq. Jur. §§ 929, 936.

A fourth point made by appellant's counsel is that neither the personal nor real representatives of Sarah Stuart or Seth Huse are parties. What matters this to the coal company or Low? They did not own the land to be affected by any back purchase money or want of legal title. No specific performance was being enforced against it, to enable it to call for parties representing the purchase money or title. It was not a suit for specific performance. It was a suit to divide the land between Davis and Settle, and the coal company was made a party, as setting up a title to the whole under Settle, or in some way. I do not see how the matter of whether Settle had paid purchase money to Huse, or Huse to Stuart, or whether legal title was yet in Stuart's heirs, was material to the coal company, from its relation to the case.

Another point made by counsel against the decree is its denial of compensation to the coal company for improvements put on the property. I need here consider this point only as to Davis. Can he be charged with improvements? He cannot. There is no evidence as to improvements. The answer asserts that they were made, and of the value of thirty thousand dollars, but the replication traverses this and thus calls for proof. There is an amended bill, which admits the making of improvements, but for which we could not say there were any. When put there we do not know; but certainly after Davis' contract had been recorded, after the coal company's agent had actual knowledge of it, after this Court had determined that Low, the landlord of the company, had no title to the

land; and it must have been after the commencement of this suit, wholly or largely. Not only had the coal company knowledge of facts sufficient to put it on inquiry as to Davis' right, but had actual notice of it, was not a *bona fide* purchaser as to him, and hence it could not, when it put improvements there, have believed its title good. They were made with eyes open to bad title. So clearly and fully has the law been stated on this subject, that it would be useless to restate it here. Under our decisions no compensation can be given for these improvements. *Hall v. Hall*, 30 W. Va., 779 (5 S. E. 260); *Darson v. Grow*, 29 W. Va. 333 (1 S. E. 564); *Cain v. Cox*, 29 W. Va. 258 (1 S. E. 298); *McKim v. Moody*, 1 Rand. (Va.) 58.

Another point is that Settle and Davis both are estopped from claim by the fact that Settle, under his right to the land sold by Sarah Stuart to Huse, and by Huse to Settle, had surveyed off a certain boundary of fifty acres, and accepted a deed from Mrs. Stuart's executor in satisfaction of his right under the Huse contract, and now cannot claim another tract in addition. We decided in *Low v. Settle* that such deed was not an estoppel upon Settle, for want of power in the executor to convey, and danger of the heirs of Mrs. Stuart avoiding the deed, and thus want of mutuality. If this be not *res judicata*, yet the estoppel would operate in favor of the heirs, not Low, as Low has no claim to this land. The coal company's right arose long after this conduct of Settle, alleged as an estoppel *in pais*.

The fifth point made against the decree is that exceptions to depositions were overruled. The exceptions are that no sufficient notice of time and place was given. It is said the state in which Greenbrier and Fayette counties are is not given. Judicial notice is taken that they are in West Virginia. A party ought to be held to know that. I think the service of one notice as to the coal company not good; but the depositions only go to prove that the land involved in this suit is the same involved in the ejectment of *Low v. Settle*, and some other matters, alleged in the bill, not denied in the answers, and otherwise than by the depositions appearing. If the depositions be stricken from the record, it would not alter the case. The coal company is the only exceptant. No matter to it that notice was not

given to others. Evidence of Davis and Settle is said not to be competent against Low, because Low is dead. They gave no evidence of any transaction or communication personal with him.

Reversed in Part and Modified.

CHARLESTON.

RILEY v. JARVIS *et al.*

(DENT, JUDGE, *not sitting.*)

Submitted June 18, 1895—Decided December 19, 1896.

1. SURETYSHIP—*Joint Principals.*

Where two persons sign an obligation for the payment of money, and it is expressed in it that one signs as surety, and he annexes to his signature the word "surety," still both are bound jointly. (p. 45.)

2. PLEADING—*Declaration—Suretyship.*

In such case the declaration need not notice the suretyship, because immaterial. (p. 45.)

3. PLEADING—*Evidence—Variance.*

Allegata and *probata* must correspond. Where there is no count in a declaration on the cause of action shown by the evidence, it is a variance, and there can be no recovery. (p. 46.)

4. PLEADING—*Bill of Particulars—Declaration.*

A bill of particulars filed with a declaration in an action of *assumpsit*, under section 11, chapter 125, Code, is no part of the declaration, and there can be no plea to it. (p. 47.)

5. PLEADING—*Declaration—Bill of Particulars.*

If there be no count in the declaration based on the claim specified in such bill of particulars, the items it contains cannot be proven, and no recovery can be had therefor. (p. 47.)

6. PLEADING—*Res Judicata—Judgment.*

A plea of *res judicata* must show that the former judgment was on the merits. (p. 47.)

7. ARBITRATION—*Order of Submission—Justice's Court.*

Where an order is made by consent in a justice's court, submitting the matter in controversy to arbitration, the submission is not revocable, except by order of the justice, under the statute, and that submission is a bar to a second suit for the same cause. (p. 47.)

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8. PLEADING—*Pleas in Abatement—Pleas in Bar.*

A plea of such submission to arbitration, filed in a subsequent action in a circuit court on the same cause of action, must be in abatement, not in bar, and comes too late after pleas in bar have been filed. (p. 49.)

9. PLEADING—*Declaration—Trial Judgment—Writ of Error.*

Where there is more than one count in a declaration, and a demurrer is sustained and judgment for defendant as to some of them, and overruled as to others, the judgment upon the counts held bad is not such final judgment as to give a writ of error until the case ends as to the remaining counts. (p. 53.)

Error to Circuit Court Taylor county.

Assumpsit by Oscar F. Riley against Claude S. Jarvis and another. There was a judgment for plaintiff, and defendants bring error.

Reversed.

J. T. MCGRAW and J. W. MASON for plaintiff in error.

W. R. D. DENT for defendant in error.

BRANNON, JUDGE:

Oscar F. Riley brought *assumpsit* in the Taylor county Circuit Court, and, judgment having been rendered against the defendants, Claude S. Jarvis and Granville E. Jarvis, they bring the case here.

The defendants demurred to the declaration and each count, and the court sustained the demurrer and gave judgment upon such demurrer upon all the counts except the first, and overruled it as to that count. The first count is the ordinary *indebitatus assumpsit* for goods, wares, and merchandise sold and delivered. The second is a special count, alleging that defendants and plaintiff made a written contract whereby Claude S. Jarvis agreed to pay individually, out of his own funds, to plaintiff, ten dollars per month, so long as they should continue in business together, or so long as the plaintiff should run the business in a business like and profitable manner, as part consideration for his time and labor about the business; that Granville E. Jarvis executed the writing and bound himself equally with Claude S. Jarvis, as security for him; and that the plaintiff, under the writing, carried on the

business for a certain specified time, for which the defendants became bound to pay him one hundred and twenty dollars, but they refused and failed to do so, *etc.* The third count was *indebitatus assumpsit*, containing a clause for goods and chattels sold, horses sold, work done, and material therefor provided, and other common clauses.

Appellants' counsel contends that there is a misjoinder of counts, and this on the idea that the liability stated in the second count is against Granville E. Jarvis only as surety, while other counts charge both Claude S. and Granville E. Jarvis with joint liability. I think there is nothing in this contention. Where two parties, by written obligation, bind themselves to pay another a given sum, though one sign with the word "surety" annexed to his name, or it be stated in the writing that he is surety, or binds himself as surety, both are equally bound as principals, so far as it concerns the creditor's right, as they both promise to pay him. It is a mere memorandum to evidence the fact that the one is surety as between the parties bound. *Hunt v. Adams*, 5 Mass. 358; *Id.*, 6 Mass. 519; *Humphreys v. Crane*, 5 Cal. 173; opinion. *Harris v. Brooks*, 21 Pick. 195; *Wilson v. Campbell*, 1 Scam. 493. Where the surety does not sign the note, but puts a memorandum at its foot that he binds himself as surety for payment of the note, it is the same. The obligation is joint and several. *Hunt v. Adams*, 5 Mass. 358; *Wilson v. Campbell*, 1 Scam. 463. I do not think the declaration need have noticed the suretyship feature, as its omission would have been no variance, because immaterial; and, being in the declaration, it does not have any effect, the count charging a joint liability notwithstanding its presence.

The defendants moved the court to strike out the plaintiff's evidence, but the motion was refused. The only evidence the plaintiff offered was the written contract, and of service under it by the plaintiff. That evidence could not sustain the action, because it presented a case of variance between *allegata* and *probata*, as the only count of the declaration remaining after action on the demurrer was that one for goods sold and delivered, the first count, and thus there was no count to justify evidence of service performed, and the plaintiff's evidence should

have been stricken out. The case was tried, likely, under a misconception that it was the second or special count, for service under the written agreement, that was left standing after the court's action on the demurrer; whereas, it is said, and is likely, by mistake in making up the record, it was the first count only that was left. We must go by the record. We have no knowledge of fact by which to correct it, and no power to correct it. The account filed with the declaration specifies, as the ground of the plaintiff's claim, service performed under the contract; but when the court, upon demurrer, struck out all of the declaration under which that account was provable, the account went out with the count to which it related, or became unprovable under the count remaining. The account is no part of the declaration. You cannot plead to it. There must be a count in the declaration for it to rest upon,—one suiting its nature under which it may be proved. So that specification of account cannot shelter this evidence. It is said, in brief of counsel, that the defendants offered evidence in defence, and that this would justify the action of the court in refusing to strike out the plaintiff's evidence. The record contains not a scintilla of any evidence given by defendants. Whatever the fact may have been on the trial, we know only the record. Moreover, had there been such evidence, it would not sustain the court's action; for, while it is true that a motion to exclude the plaintiff's evidence must be made before the defendant offers any, I suppose the case is different where it is one of total variance between *allegata* and *probata*, as there is no count at all to rest the evidence on. Though you have ever so strong a case for recovery under the evidence, you cannot recover without a declaration to admit that evidence.

Again, it is said that the defendants waived their demurrer as to the second count on the theory that they pleaded to it. The court gave final judgment upon the demurrer in favor of the defendants on that second count, and how even a plea to that specific count at a subsequent term could bring back that count to the declaration I cannot see, or how they could waive their demurrer. But there was no plea to that second count specifically. The plea of payment relied on as such waiver was made at a term after

that at which the court acted on the demurrer, and that plea, so far from being applicable to the second count, was applicable only to the declaration as it then stood—that is, to the first count.

It is argued that the plea of payment is to the account filed as a specification of the plaintiff's claim, and that is for service, thus treating the demand specified in it as before the court. (1) The plea is in terms to the debt demanded in the declaration. (2) There can be no plea to a bill of particulars. *Abell v. Insurance Co.*, 18 W. Va. 400. (3) There could be no such account without a count to support it. But it is said that, even if the second count be treated as out of the case, the plaintiff should have recovered under the first count for goods sold and delivered, as there was no other plea than payment, which acknowledges the plaintiff's demand. This position loses its force when we see that the plea of *non-assumpsit* to the whole declaration was put in at the same time the demurrer was entered.

Appellants complain of the rejection of two pleas. One was a plea of *res judicata*, based on a judgment of a justice for some cause in favor of defendants. It is faulty, because it does not in any way show that the dismissal of the suit before the justice was on the merits, so as to be a bar to a second suit; for, if it was a nonsuit or any other of many causes not precluding another suit, it would not bar. 1 Bart. Law Prac. 534, 535; 7 Rob. Prac. 221; 1 Greenl. Ev. § 530; *Burgess v. Sug*, 2 Stew. & P. 341. A plea should aver that the decision was on the merits, or it should at least appear by the record vouched. This plea does not vouch the record of the judgment or so aver.

The other rejected plea is that, in another action for the same cause before a justice, there was a submission to arbitration yet pending. The plea is bad, as not stating and describing formally the action in which the submission took place. It wants legal certainty on that point. Does it present good cause for abating this action—that is, does the submission to arbitration bar another action for the same cause? It seems well settled at common-law that a mere agreement to submit to arbitration will not preclude a new suit. Refusal to comply with it is only a ground of action for damages. *Corbin v. Adams*, 76 Va. 58; *Morse*,

Arb. 79; *Smith v. Compton*, 20 Barb. 262; *Tobey v. County of Bristol*, 3 Story, 800, (Fed. Cas. No. 14,065); *Knaus v. Jenkins*, 40 N. J. Law, 288; 1 Bart. Law Prac. 581, note; note in *Nettleton v. Gridley*, 56 Am. Dec. 383; *Haggart v. Morgan*, 55 Am. Dec. 350, 354. The agreement is revocable until actual award; but then it is not, and the award may be pleaded in bar of another action. *Martin v. Railroad*, 15 W. Va. 512; Morse, Arb. 90; *Corbin v. Adams*, 76 Va. 58. Until the award the agreement is revocable, as will appear from authorities above, and cases cited as to its revocability in *Nettleton v. Gridley*, 56 Am. Dec. 383. And when the agreement has been made a rule of court, it is no longer revocable. *Leonard v. House*, 15 Ga. 473; *Brickhouse v. Hunter*, 4 Hen. & M. 363; *Haskell v. Whitney*, 12 Mass. 47; *Frets v. Frets*, 1 Cow, 335; note to *Nettleton v. Gridley*, 56 Am. Dec. 383. While the rule at common-law is that an agreement to arbitrate will be revocable before award, and will not bar another action for the same cause, how is it under our statute? It is different. The very purpose of our statute provisions on the subject was to render arbitration more effective than it had been. The reason why the agreement was revocable under common-law was, not that arbitration was not favored by it as tending to end litigation, and not for want of consideration, as the ending of litigation was strong consideration, but because of that principle of law that parties could not, by agreement, oust the courts of the jurisdiction assigned them by law, and could not debar themselves from appealing to the law and tribunals of the land; but our legislation has legitimated such agreements, and thus the reason of the old principle has been abrogated.

Our Code (chapter 108) provides that, whether a suit is pending about a controversy or not, parties may submit it to arbitration, and agree that such submission be entered of record in any court, and, on proof of such agreement out of court, or by agreement in court, the submission shall be entered in court, and a rule made on the parties that they shall submit to the award under it, and that such mere submission, either entered or agreed to be entered, shall not be revocable without leave of court. This is at once seen to go further than common-law, since by it not until award was the submission irrevocable, but

under statute the submission by agreement in court, or by agreement out of court that it be entered in court, is not revocable. Under it, do you let the party ignore the submission and bring a new suit? If so, where is the sense of making the submission not revocable? This Court, under this statute, has held that an agreement to arbitrate, providing that the award shall be entered as the judgment of the court, cannot be revoked without leave of court. *Stiringer v. Toy*, 33 W. Va. 86, (10 S. E. 26). The justice's law (Code, c. 50, s. 92) provides, as I understand it, that, in a pending action, the parties may by agreement submit to arbitrament, and section 93 provides for judgment on the award. Now, when such submission is made by order in the case, it is not revocable for two reasons: (1) Because section 96 says that, if no award be returned in fourteen days, the justice may set it aside, but not without notice to the other party, thus giving him right to contest, and showing that it cannot be revoked at the mere pleasure of one party; and (2) because, when the submission is entered in the docket, it is a recognition by the court of the arbitration, and is in itself a rule, or equivalent to a rule, upon the parties to submit to the coming award, which, we have seen, renders the submission at common-law even irrevocable. Their agreement implies a consent that the submission shall be made a rule of court. The rule is idle form. *Morse*, Arb. 80.

But how, in a second suit, is the submission in the first to be availed of? Not by a plea in bar, for the mere submission does not, like an award, pass on the merits. You can plead an award in bar, but not a mere submission, or a pending arbitration. You must use a plea in abatement, as the fact the plea sets up does not bar the cause of action, but only abates the second suit. It is the same as the plea of another suit pending for the same cause, which must be a plea in abatement. 1 Bart. Law Prac. 290; *Robrecht v. Marling's Adm'r* 29 W. Va. 765, (2 S. E. 827); *Morse*, Arb. 79. The plea in this case was tendered after a plea of *non-assumpsit*, and came too late, and was for that reason rightly rejected.

Judgment reversed, verdict set aside, new trial granted, and remanded.

ON REHEARING.

BRANNON, JUDGE :

The court's action on the demurrer, struck from the declaration every bit of its matter which could warrant the admission of the evidence on which alone the verdict can rest. A case was proven utterly without any pleading, in violation of the rule universally accepted, that there must be both *allegata* and *probata*, and there can not be judgment on one of them alone. A party cannot be summoned into court to answer one cause of action, and then be surprised by having a totally different one proven against him. That is just what was done in this case. At one term the court eliminated from the declaration all of it which would admit evidence of services rendered by the plaintiff, retaining the count only for goods sold, thus saying to the defendants that they would not be called upon to meet a demand based on such services, but only a demand based on goods sold. At a later term, without asking the court to reconsider its action on the demurrers, and restore the count based on such services, the plaintiff proved a case based on services rendered under written contract declared on in a rejected count, without any notice to the defendants that they would prove such a case. That is the plainness of this case. It would seem manifest that a legal surprise was inflicted on the defendants by the proof of a case which they were not called on by the pleadings to answer, and that such surprise can only be redressed by a new trial under altered pleadings.

But let me advert to some views earnestly urged upon us as an antidote to this palpable error. It is said that the court erred in sustaining the demurrer, and thus excluding the special count, and that, in admitting evidence under it of services for fixed compensation under the written contract, the court corrected that error, and reached in the end a right judgment,—the same it would have reached had it not committed that error; in other words, it could have reconsidered and overruled the demurrer, and restored the count in question by actual order, and it has in effect done so. This would be to let the plaintiff prove his case without a bottom to rest on, and afterwards insert a

bottom to sustain it. If here there were no legal harm done to the other side we could listen to the argument; but there was surprise upon the other side of the case, working prejudice to it, because a case not presented by the declaration is sprung upon the defense for the first time after the jury is sworn. It is, in this particular instance, more a surprise, if possible, than if the declaration had never contained this count, from the consideration that the court expressly expunged it, thus assuring the defendants that they would not be expected to meet the case made by that count. Suppose a plea is stricken out or rejected improperly; does the fact that it was improper to so rule warrant the defendant in proving a case under it, and save his judgment from reversal?

We are cited to *Butt v. Butt*, 118 Ind. 31 (20 N. E. 538) saying: "Where the judgment is clearly right on the facts found, it will not be reversed on account of intermediate errors." That is so where the error is harmless; but will that general statement be used to atone for every error? Will it be allowed to sustain a judgment based on proof without a declaration? Is that error harmless to the defendant? Simply because we are able to say that the evidence of the plaintiff alone shows ground for the judgment, are we to sustain it, when we know there was no allegation to warrant that evidence, and the defendant's case was not shown, because, he being assured by the court that such case would not be proven against him and he need not bring evidence to repel it, he did not prepare to repel it? How can we say the judgment is right, under such circumstances, even under the rule as expressed in the Indiana case, which is only the rule of harmless error everywhere prevailing?

We are cited to Elliott, App. Proc. § 590, saying that, "if the ultimate ruling is clearly right, intermediate mistakes are not of controlling importance; if that ruling is right, there is no error." But the section does not stop there, but goes right on, saying: "A mere mistake or irregularity cannot be regarded as error where it is substantially rectified by subsequent and controlling rulings." Now, under this clause, I ask, where was this error of admitting proof of a case not alleged corrected? Nowhere, for the court, on the contrary, rendered final judgment on

that proof. But the section continues, and says: "But, if the mistake is carried forward, and so warps the course and rulings of the court as to operate to the substantial injury of the party complaining, there is error, within the meaning of the law." That "mistake or irregularity" was carried into final judgment.

An extract from Steph. Pl. 204, is given us, that "judgment will, in general, follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound to examine the whole record, and adjudge either for plaintiff or defendant, as it may on the whole appear, notwithstanding, or without regard to, the issue in law or fact that may have been raised or decided between the parties." But Stephen goes on, and says: "Therefore, whenever, upon examination of the whole record, right appears, on the whole, not to have been done, and judgment appears to have been given for one of the parties, when it should have been given for the other, this will be error in law." I think this relates to pleadings, not evidence; but it is sought to be applied here to sustain the judgment, whereas, if applied, I think it reverses it. And why? When the circuit court came to enter judgment on the verdict, if it had looked back on the whole record, it would have seen that that verdict stood on evidence without pleading to admit it, and so it could not give judgment for the plaintiff, but ought either to give judgment for defendants *non obstante veredicto*, because no case was proven against defendants on the pleadings, or award a new trial, to let the plaintiff restore his count to receive that evidence, or prove a case under the first count. I think the proper course would have been to set aside the verdict, rather than give final judgment for defendants.

We are cited to *Stolle v. Insurance Co.*, 10 W. Va. 546, holding that, where a declaration and each count was demurred to, and the demurrer overruled, whereas it ought to have been sustained to the first and overruled as to the second, but merely because the second was poorly drawn, and the facts sustained the second as well as the first, and judgment was rendered for the plaintiff, this Court affirmed it. Certainly. There was error in refusing to strike out one count; but there was a good count

under which the evidence was receivable, and that made the verdict good, notwithstanding the error in refusing to reject the bad count. It was harmless error, because, if that count had been rejected, there would remain the good one to warrant the evidence and verdict, and it proved the same case made in the other. Very different is this case, where there was left nothing in the declaration to admit the evidence on which the verdict rested. See *Murdock v. Herndon's Ex'r's*, 4 Hen. & M. 200.

It may be well to say something further, with a view to further proceedings in the case. Is the judgment that the plaintiff take nothing on all his declaration save the first count final, so that the court cannot reconsider and overrule the demurrer? Is that judgment appealable? If it is, it is beyond the power of the circuit court, and, as *res judicata*, would likely forbid any amendment to allow a count on the same matter, and an appeal would be barred, so that we could not consider it on cross error. But I do not consider it appealable. True, it is, in character or quality, final as a judgment on those counts, because it is a judgment of *nil capiat* on them; but there was still left a count, and the judgments on the demurrer did not end the case. In a law case, a judgment, to be final, so as to warrant a writ of error, must end the issue presented by the whole case. Code, c. 135, s. 1, cl. 1; 2 Bart. Law Prac. 761. Therefore, the plaintiff could have asked the circuit court to reconsider the demurrer and overrule it, and thus restore the rejected counts, and, if it refused, could have entered a *non pros.* on the first count, and thus have rendered the judgment final for writ of error, so it be in time. The plaintiff can ask such reconsideration of the demurrer, and in view of that we hold the demurrer was not well taken, and it was error to sustain it. As based on the idea of misjoinder, it is untenable for reasons given in the first opinion. If based on the idea that it is a partnership matter, of which equity alone has jurisdiction, it is untenable, because it is not a contract within the partnership or its business, but independent of it. Therefore, if asked, the circuit court must set aside its judgment on the demurrer, and wholly overrule it, and thus restore the declaration as it was. Reversed, verdict set aside, and new trial, and remanded.

Reversed.

CHARLESTON.

O'CONNOR v. DILS.

(HOLT, PRESIDENT, *concurring*.)

Submitted September 12, 1896, Decided December 30, 1896.

1. JUSTICE OF THE PEACE—*Forms of Action*.

Common-law forms of actions, in so far as justices' trials are concerned, are entirely abolished by section 49, chapter 50, Code. (p. 56.)

2. DAMAGES FOR A WRONG—*Money Due on Contract*

The words "damages for a wrong" are, in substance, according to their legal definition, equivalent to the words, "money due on contract"; the former phrase being broader than and including the latter according to ordinary legal phraseology and meaning. (p. 57.)

3. STATUTORY ACTIONS—*Recovery of Money—Pleading*.

Where a person sues to recover money lost at gambling, stolen, or for which *indebitatus assumpsit* would lie at common-law, either phrase is sufficient in the summons to describe the cause of action. (p. 58.)

4. JUSTICE OF THE PEACE—*Statutory Actions—Actions ex contractu and ex delicto*

The provisions of chapter 50 of Code were not intended to keep up the distinction between actions *ex contractu* and *ex delicto* as at the common-law. (p. 60.)

Error to Circuit Court, Kanawha county.

Action by Patrick O'Connor against William Dils before a justice of the peace. Judgment for defendant. Plaintiff appealed to the circuit court. From a judgment for plaintiff, defendant brings error.

Affirmed.

KENNEDY & DYER for plaintiff in error.

BROWN, JACKSON & KNIGHT for defendant in error.

DENT, JUDGE:

Patrick O'Connor sued William Dils, before a justice of the county of Kanawha, for a certain sum of money lost at gambling. He moved to quash summons, because it summons him to answer an action "for damages for a wrong" instead of "money due on contract." The justice overruled the motion, but rendered final judgment in favor of

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58	281
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61	135
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62	115
62	400
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defendant. Plaintiff appealed, and the circuit court rendered judgment in his favor for the sum of one hundred and nine dollars. The defendant obtained a writ of error, and now assigns as error that the circuit court refused on his motion to strike out the evidence as showing a variance between the same and the writ.

There are two questions presented for consideration: First. Was the summons part of the pleadings, and, if so, had the court a right to amend it? Second. Is the summons sufficient to cover the case made out in evidence? If the summons is a part of the pleadings, the circuit court had a right to amend it, under clause 10, section 50, c. 50, Code, which is in these words: "The pleadings may be amended at any time before the trial or during the trial when by such amendment substantial justice will be promoted." It is provided by clause 2 of same section that the pleadings "may be oral or in writing," and this would indicate that the summons is not to be considered part of the pleadings, but, having served the purpose of bringing the defendant into court, it had fulfilled its mission, and therefore was no longer to be regarded, and the motion to strike out the evidence was properly overruled, as the pleadings were oral, and written out in the justice's record, as appears from the transcript. If the summons is to be regarded in the light of a pleading, or a part thereof, the justice had the right to amend the same; and this he can do and did do by entry of the oral pleadings on his docket. The effect being to produce the amendment, it is not necessary to set out in words that the summons is hereby amended by striking out certain words and inserting others, but the additional pleading and the summons will be read together, and all unnecessary words be regarded as surplusage. That being the case, the summons, as amended, would read that the defendant was summoned or called upon to answer an action for money won by him from the plaintiff at gambling. This would give defendant complete notice of the plaintiff's cause of action. In the case of *Fouse v. Vandervort*, 30 W. Va. 334 (4 S. E. 302,) it is said: "The summons is not in all respects intended to be a substitute in justices' courts for the declaration in courts of records. And especially is this so in regard to stating the cause of action, because the statute ex-

pressly provides for a complaint to be filed by the plaintiff in which he shall state his cause of action. It is sufficient to state in the summons in a general manner the nature of the plaintiff's claim and the amount for which he will demand judgment. If there is any error in this respect, it can be remedied in the complaint which the plaintiff is required to file." The distinction really to be drawn between the words "for money due upon contract" and "damages for a wrong," while partaking of the same nature, is not to be referred to the common law, but to section 8 of the chapter, which provides. "The jurisdiction of justices within their several districts and counties shall extend to all civil actions for the recovery of money, or the possession of property including actions in which damages are obtained as a compensation for a wrong." And it is provided in section 49, "The forms of action now existing shall not apply to justice's courts and there shall hereafter be but one form of action in said courts, which shall be denominated a civil action." Thus entirely abrogating all common-law forms except as provided in the chapter. So it is in the chapter alone that we must look for the settlement of the question under discussion.

In the first place, there is but one form of action, which is a civil action, and this determines the character of the summons. Then all that follows after the words "civil action" in the summons, to wit: "for money due on contract," or "for damages for a wrong," is a statement of the cause of action, and is, therefore, pleading to that extent, and hence would be amendable, not by a change in the summons, but by the complaint, either oral, entered on the justice's docket, or in writing. This is why no provision is made for the amendment of the summons, for the complaint does that to the extent the summons states the cause of action. The form of the summons given is not intended to be unchangeable, but section 26 provides that it shall be in such "form or substance," and also provides "but no summons shall be quashed or set aside for any defect therein if it be sufficient on its face to show what is intended thereby." Hence the conclusion follows that the legislature, in using the words "money due on contract" or "for damages for a wrong," as the case may be, was not prescribing the form of the complaint, but was simply

suggesting the manner in which the cause of action could be stated; and therefore any other statement which, in substance, would, amount to the same thing, would be sufficient to satisfy the requirements of the statute. Then, are the words "damages for a wrong" in substance the same as "money due on contract"? The meaning of the word "damages" is a compensation, recompense, or satisfaction in money; "wrong" means any deprivation of right, breach of contract, or injury done by one person to another. Hence "damages for a wrong" means "money given for a breach of contract" as well as any other deprivation of right or injury to person or property. The words "damages for a wrong" therefore not only include "money due on contract," but money which one is entitled to recover off of another for any purpose whatsoever, and is the much broader and more inclusive expression. In substance, then, the statute was fully complied with, and the court did not err in refusing to reject the plaintiff's evidence, or to set aside the verdict and grant the defendant a new trial. It is especially provided in clause 9, s. 50, c. 50, Code, that "a variance between the proof on the trial and the allegations of a pleading shall be disregarded as immaterial unless the justice shall be satisfied that the adverse party has been misled to his prejudice." This would cure all defects of the summons as a pleading. Therefore the justice did not err in refusing to quash the summons. The judgment should be affirmed.

HOLT, PRESIDENT, (*concurring*).

Chapter 50 of the Code, containing two hundred and thirty-nine sections, is intended to be a complete code of procedure for justices of the peace. It provides (section 49) that there shall be but one form of action which shall be denominated a civil action. Each action is a special action on the particular case, and the complaint must state in a plain and direct manner the facts constituting the cause of action. The copy of the complaint is not served, but the suit is instituted and the parties are brought together by the service on the defendant of a summons, which makes the broad classification of (1) a civil action for the recovery of money due on contract; (2) for damages for a wrong, as the case may be, which comprehends such civil wrongs as do not arise from

breach of contract as are within the jurisdiction of the justice. See section 8 *et seq.* See preface and chapter 1, Bish. Noncont. Law; 5 Enc. Pl. & Prac. 556.

The main purpose of the summons is to bring the parties together, and then the pleadings *pro* and *con* commence, for the statute provides for their coming together and beginning the suit without any summons (section 19), and the function of the summons is for the most part accomplished, —entirely accomplished so far as relates to the statement of the cause of action. Then and there the plaintiff in his complaint states in a plain and direct manner the facts constituting the cause of action, giving no name to his complaint, either in contract or in tort, leaving it for the justice to give it such name or classification as he may see fit, provided he gives him the proper judgment impliedly containing the concrete point of law which springs up out of the facts alleged and proved. So that the plaintiff does not fail, and there is no good reason why he should fail, by reason of the mistake he may make in the summons of designating his cause of action in this class of cases as belonging to contract or non-contract,—a mistake, if any, at once corrected by his complaint. This must be the true construction, for, as we have seen, the very object of this system of pleading is to enable the justice to apply the proper rule of law to the facts alleged and proved, and give the proper judgment thence arising. Any other view would, at the first step, thwart the main purpose of this Code called chapter 50, by entangling the plaintiff in trying to give the right name to his summons, when the breach of duty should happen to fall within the ill-defined space within which tort and contract mingle or blend or overlies each other in ways partly plain and familiar and partly obscure (see Bish. Noncont. Law, § 72), and comprehending the doctrine of naming a tort and suing on a contract; thus ensnaring the plaintiff into the decision at his peril of legal questions of nomenclature, *etc.*, which it is the main purpose of this new system to avoid. And clauses 9 and 10 of section 50 of chapter 50 imply that the summons needs no amendment in that regard, by providing that before the trial and on the trial the pleadings may be amended, or a variance between proof and the allegations of a pleading may be disregarded

in certain cases as immaterial; and, even if that were not so, the specific statement in the complaint of the facts constituting the cause of action would be taken as qualifying, overruling, controlling, if necessary, the general statement contained in the summons; as, for example, a putting of the cause of action in the wrong class as a wrong conclusion of law (4 Enc. Pl. & Prac. 742), for the plain reason that there is but one civil action, and the complaint is the first and only statement of the constituent facts of the cause of action. If the summons had said "for the recovery of money due by (*quasi*) contract," it would have been technically right; for the statute (section 1, chapter 97) expressly declares the contract of betting and gaming to be void, and will sustain the count for money had and received. See *Thompson v. Thompson*, 5 W. Va. 190; *Spring Co. v. Knorrilton*, 103 U. S. 49; 4 Enc. Pl. & Prac. 749.

Pleadings under the Code system are to be liberally construed, and so dealt with by construction and privilege of amendment as to subserve the administration of substantial justice between the parties. See 4 Enc. Pl. and Prac. 749. But what was this transaction according to its facts? It was a contingent agreement that defendant should have plaintiff's money if he beat plaintiff at a game of craps. This he did, and got plaintiff's money, with plaintiff's consent. The agreement was made and executed, and, without something to intervene, the maxim, "*Volenti non fit injuria*," would apply. But now the statute comes in, and says, "Your contract was void and each of you was bound to know it," and says further (section 2) that plaintiff, the loser, may recover the money back from defendant, the winner, by suit in court or before a justice, according to the amount or value; thus binding on defendant the personal duty of refunding to plaintiff the money. This duty imposed by law to refund money obtained by unlawful contract defendant has violated. See 1 Poll. Jur. 81, 82. The executory contract of gaming was the occasion of executing it; the execution of it the statute created into a cause of action against the will of the defendant. This duty to refund, this right to have refunded, was not created by any contract, express or to be implied from any facts in the case. It contained but one element in

common with a contract—that of being personal; a right and duty between definite persons. In other respects, this being for money, it is a common-law trespass on the case in assumpsit, or tort *ex contractu*, as plaintiff may please. For a discussion of the doctrine of actions *quasi ex contractu* and *quasi ex delicto*, illustrated by the development and application of the generic action of trespass on the case, see Holmes, Com. Law, 183, etc.; Biglow, Lead. Cas. 20; *Chandelor v. Lopus*, 1 Smith, Lead. Cas. (9th Am. Ed.) 319, 330. On the nature and scope of the obligation of *quasi* contracts, see Keener, *Quasi Cont. c. 1 et seq*; *Robinson v. Welty*, 40 W. Va. 385, 392 (22 S. E. 73); 1 Beach Mod. Cont. Law, § 640, note 5; Sandars, Just. by Hammond, 37; Maine, Anc. Law (3d Am. Ed.) 332.

From this we have enough to see that, if plaintiff had in his summons followed the common-law method of looking at the cause of action *quoad* the form of procedure, he would have said in a civil action for the recovery of money due on (*quasi*) contract; and on the motion to quash, which no doubt would have been made, the plaintiff could have made two sufficient answers: (1) It is not the business of Code pleading to create rights and their correlative duties; but it is a method of procedure to enforce them, as distinguished from the law which gives or defines the right (*Poyser v. Minors*, 7 Q. B. Div. 329, 333); and this is a *quasi* contract under the substantive law. (2) What is there on the face of the summons to show that my cause of action is not what I call it—money due on contract? Therefore the motion would on both grounds have been properly overruled; but if it had been sustained, and the amendment been allowed, substituting damages for a wrong, and the complaint had been filed stating in a plain and direct manner the facts constituting the cause of action, the motion to quash would have been again made by defendant's attorney, not only as a matter of caution to save the point, but perhaps in analogy to common-law procedure, with something more of plausibility. But now the plaintiff can meet him with some half a dozen sufficient answers: (1) This now appears to be a noncontract duty, which has been violated—a tort *ex contractu*. It has been created by statute because of the execution of a contract, but against defendant's will. It is therefore a wrong at

my pleasure as to methods of procedure. See Bish. Non-cont. Law, §§ 72, 73; Busw. Lim. § 209, "Torts *ex contractu*;" Bliss, Code Pl. § 14; Maxw. Code Pl. p. 36. (2) The parties have now been brought together, and, the summons having performed its chief function, your motion comes too late. (3) It is no part of the function of the summons to state the facts constituting the cause of action; that is the function of the complaint. (4) It is the function of the complaint to state the group of facts constituting the cause of action, but need call no names, leaving it for the three successive courts at their own pleasure to call it an action on contract, or an action on noncontract; provided they give him the judgment he shows himself entitled to as arising out of the facts stated and proved (as was done in this case). (5) But I find, on looking to the transcript of the record, that the defendant did not move to quash the writ and dismiss the case until after the complaint had been filed; and then having appeared he could only make defense by answer, or by exception to the complaint as not sufficiently explicit to be understood, or as containing no cause of action; so that the motion to quash the summons was out of time and out of place. In other words, the summons can not, at any stage, be quashed on that ground. (6) The appeal to the circuit court was allowed, and then it was the duty of that court to try the case *de novo*, upon the pleadings made up in the justice's court, or to permit the pleadings to be amended before or during the trial of the appeal when substantial justice would be promoted by the amendment.

As no error in the pleadings has been pointed out, and as I have not been able to discover any, I take for granted that substantial justice did not require any to be made, and that the judgment, which is plainly right on the merits, ought to be affirmed.

Affirmed.

CHARLESTON.

BLAIR v. CITY OF CHARLESTON.

(DENT, JUDGE, *concurring*.)

Submitted September 14, 1896—Decided December 31, 1896.

1. MUNICIPAL CORPORATIONS—*Change of Grade—Damages.*

If a street be opened and used upon the natural surface as a grade line, and it is recognized and treated by a city or town as a public street, and owners of lots upon it build with reference to such natural grade line, and it is changed, the city or town is liable to lot owners for damages consequential upon the change of grade, though no grade for the street was ever adopted by the municipality, under section 9, article III of the Constitution. Such natural grade thus became the established grade. (p. 64.)

2. MUNICIPAL CORPORATIONS—*Paper Grade Line—Damages to Buildings.*

Though such owner purchase after the municipality has established a paper grade line, but before actual physical grading conforming a street to that line, that will not preclude his recovery for damages to his lot; but he cannot recover for damages to buildings erected after the adoption of such paper grade. He must conform to such grade line. (p. 68.)

3. DAMAGES—*Measure of Damages—Change of Grade.*

The measure of damages for injury to property from change of a street grade line is that sum which will make the owner whole; that is, the diminution of the market value from the change. If the market value is as much immediately after as immediately before the change, no damages can be recovered. (p. 69.)

4. DAMAGES—*Estimating Damages—Change of Grade.*

In estimating damages to property from change of grade in a street, all damage and injury arising from the change causing a diminution in the value of the property are to be regarded, abating all special benefits to the property enhancing its value arising from the change of grade, but not general benefits shared by the property owner in common with others in the community at large. The question is one of damage, less special, but not less general, benefit. (p. 70.)

5. PUBLIC IMPROVEMENTS—*Special Benefits to Property—General Benefits to Property.*

What are special benefits? If property is enhanced in value by reason of a public improvement, as distinguished from the general benefits to the whole community at large, it

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57	422
57	424

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55	287

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is specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to greater or less extent, be likewise specially benefitted. In other words, it is not only such benefits as are special, or limited to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value—that is, specially benefited—that are to be considered. If a piece of property is enhanced in value, its enhancement, or in other words, benefits to the property, cannot be said to be common to any other piece of property specially enhanced in value, and it is thus specially benefitted within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. (p. 70.)

6. *EVIDENCE—Opinion Evidence—Damages.*

Opinions of witnesses as to the value of property before and after a change in a street's grade are admissible as evidence in actions against municipal corporations for damage flowing from such change. (p. 73.)

Error to Circuit Court, Kanawha county.

Action by A. C. Blair against the city of Charleston. Judgment for defendant, and plaintiff brings error.

Reversed.

W. S. LAIDLEY, S. C. BURDETT and A. C. BLAIR for plaintiff in error.

HARRISON B. SMITH and COUCH, FLOURNOY & PRICE for defendant in error.

BRANNON, JUDGE :

America C. Blair brought an action in the Circuit Court of Kanawha county against the city of Charleston to recover damages for injury to her lot consequent upon grading Morris street, the work placing an embankment of six feet height above the natural surface of her lot, leaving it and her house that much lower than the street, rendering it difficult of access, causing the lot to be wet, and the cellar to have water in it. Verdict and judgment for city.

The law books tell us that, for grading streets, or changing grade, or other lawful works done by a city or town, no action lies for consequential injuries to adjoining property if the work be done skillfully and not negligently; but we must not be misled by the text of the older books

in this matter, as they lay down the rule under constitutions saying that private property shall not be taken for public use without compensation, and there can be no liability where merely damage to adjoining property results from the work, but only when the property is taken, or the injury is equivalent to its taking. But our Constitution of 1872 added the word "damaged" to the language of the former Constitution, so that the clause in section 9, article III, is "Private property shall not be taken or damaged for public use without just compensation." Under this change it is settled that, where once the grade has been actually established, and improvements on property have been made with reference to that grade, and that grade is changed by raising or depressing it, and damage results to the property, the municipality must answer it, though the work was free from negligence. *Johnson v. Parkersburg*, 16 W. Va. 402; *Hutchinson v. Parkersburg*, 25 W. Va. 226; Dill. Mun. Corp. § 996b; Beach, Mun. Corp. § 1141. But it is said that this unquestioned rule does not determine the case in hand, for the reason that a system of grades for the city had been adopted long before the plaintiff owned this property, or began the construction of her house upon it, which system was of record in the proceedings of the council, which she knew, or might have known, before acquiring the lot or building. Morris street was a public street before the adoption of this ordinance or paper grade, and that grade existed only on paper, or in contemplation, until after the plaintiff purchased, and was then physically established, working the injury sued for. Is it law that the first grading—that is, physical grading—can be done with impunity, no matter how much it hurt the adjoining landowner, and that the constitution gives compensation only when that is abandoned and another grade substituted? Let us view this question as to the land alone, separate from the house. There is the constitution, saying, without any such exception, that the citizen's property shall not be damaged without paying him. But, in applying it, is there reason to make such exception? It may be said that, when the city acquired land for the street, whether by condemnation, purchase, or dedication, grading and consequent damages were contemplated and included, and thus the owner and his

alienees are barred from damages. If acquired by condemnation, that would be a defense, as the compensation pays for the land actually taken and damages to the residue. If acquired by purchase or dedication, the seller or dedicator would contemplate, presumptively, a grade following the natural surface; at any rate, not one grievously injuring the residue of his property. Suppose a man sells or gives land for a street. If the grade is at once made, he has no claim. It is opened and used for years on a surface grade, and then a grade is made gravely injuring him. Is there any reason why he should not be compensated? By the use of the street in its natural grade, the city has adopted it, and people may improve with reference to it; and, if it abandon that grade, so used, and substitute another, it ought to be regarded as an alteration of an established grade. Otherwise, landowners must wait indefinitely before improving; for, if they do not, they may be ruined by change of grade. The constitution surely does not mean this.

This question has been up in states having similar provision in their constitution or laws to ours. In *City of Bloomington v. Pollock*, 141 Ill. 351 (31 N. E. 146), the court said that it was immaterial whether such grading was done under an ordinance establishing a grade in the first instance, or under an ordinance abandoning the grade, and the fact that the grade was fixed before the plaintiff's purchase was no defense to an action for damages. In *Davis v. Railroad Co.*, 119 Mo. 180 (24 S. W. 777), it is said by the court that the dedicator should only be held to give implied consent to improvements such as would put the street in a condition safe for use on the natural surface, and the syllabus and opinion hold that an owner of a lot is entitled to consequential damages from the change of the natural surface to a legally established grade. Approved in *Hickman v. City of Kansas*, 120 Mo. 110 (25 S. W. 225). In *Borough of New Brighton v. United Presbyterian Church*, 96 Pa. St. 331, it was contended that as the owner of ground had laid it out in lots, and the town had never fixed grades, it was not liable for grading the first time, but it was held that a change from the natural grade was such a change as called for damages. The court said: "A change from the natural grade is a

change of grade, just as much so as if changed from a grade previously made by the authorities. When the borough accepted the street, she took it as it then was, in width, line, and grade. The statute, in giving compensation, carrying out the constitution, is remedial. It gives damages where none before could be recovered. It should receive a liberal construction to effect its object." In *Jones v. Borough of Brighton*, 144 Pa. St. 638 (23 Atl. 252), it was held that a land owner who lays out and dedicates a street to public use is not precluded from damages for a change of grade, at least where the change is not made for several years after the dedication, and is an act separate from the opening of the street, as it is in the case in hand. So in *Pucy v. City of Alleghany*, 98 Pa. St. 522. These principles are approved in *O'Brien v. Philadelphia*, 150 Pa. St. 589, (24 Atl. 1017.)

But counsel say that the Pennsylvania constitution is that compensation is to be given for damages by construction and enlargement of works, highways, etc.; covering, thus, the original construction. But I answer that our Constitution is intended to cover the whole scope of injury, and include any act working the injury, and that it is not limited to enlargement or alteration. In Missouri, the clause is twice held to give the right to damages when the property is injured "by establishing the grade of a street, or by raising or lowering the grade as previously established." *Hickman v. City of Kansas*, 120 Mo. 110 (25 S. W. 225.) The Massachusetts statute gives pay for damages "by reason of any raising or lowering, or other act done in repairing." Pub. St. Mass. c. 52. § 15. It was held, in *Snor v. Inhabitants of Provincetown*, 109 Mass. 123, that where no grade is established, the establishment of one afterwards is a change within the statute. (Such was the case here.) And where a street was laid out in 1861, and a grade was established, but the street was not built at such grade, and the city, by repairs and otherwise, recognized the existing grade, and in 1877 the street was brought to the grade originally established, it was held actionable, because this change was not a part of the original construction of the street. *City of Cambridge v. County Com'rs of Middlesex*, 125 Mass. 529. In *Aldrich v. Board, etc.*, 12 R. I. 241, the owner was given damage

for a change of grade, though the first grade had never been formally established by the aldermen. It was enough that the street had been used and worked.

Morris street has been a street, I gather from the ordinance recognizing it in 1872, before that date, and presumably treated by the city as such, and used by the public by a grade of the natural surface or an artificial one. In 1872 a grade line is fixed for it on paper, and commencing work in 1891 or 1892 the street is by physical grading made to conform to it. If improvements were made on lots before the paper grade line of 1872, while the street was used and recognized by the city on the natural grade prior to 1892, while the city invited improvements upon it by adopting it, and then change grade physically, where is there reason for excluding lot owners from compensation for damages consequent upon the change of grade. It would be a case falling under the two Massachusetts cases first cited, and under the Illinois, Missouri and Rhode Island cases.

There is a case in Kansas *contra. Interstate R. R. Co. v. Easley*, 46 Kan. 197. So *Sargent v. Tacoma*, 12 Wash. 212. The case of *Folmsbee v. Amsterdam*, 142 N. Y. 118, is referred to by the city's council as holding that there is no inhibition on grading a street until the grade has been established and graded. There a statute charter made a city liable for change of grade "when the grade of a street has been established and the street graded accordingly." There the very letter required the street to have been established and graded; and, moreover, the case strongly sustains the position I take, as it holds that "to establish the grade of a street, within the meaning of said charter, it is not essential there should be a formal ordinance. It may be established by long use and the acquiescence and recognition of the municipality." In *Dalzell v. City of Davenport*, 12 Iowa 437, the letter of the act giving damages limited the recovery to a change from "a grade established by the city engineer," and therefore has no force here. The case of *Henderson v. City of Minneapolis*, 32 Minn. 319 (20 N. W. 322), was based on the law, without regard to the change in the constitution, as the opinion shows. So with *Selden v. City of Jacksonville*, 28 Fla. 558 (10 South. 457). It related to a constitution de-

claring that private property should not be "taken or appropriated for public use without compensation," not to one having the word "damaged," like ours. *City of Anderson v. Bain*, 120 Ind. 254 (22 N. E. 323), and other Indiana cases cited, are on statutes giving damages in terms for change of established grade. Justice Brewer, in *McElroy v. Kansas City*, 21 Fed. 257, said, under such a clause, that damage in establishing or lowering or raising a grade was actionable. Upon the above authorities I think it safe to say that, if a street is a public street of a town, though no grade for it was ever fixed by the town, but it is used upon the natural surface grade for any considerable time, and improvements have been made, upon lots lying upon it, with reference to such grade, before any grade line is established, and it is changed to the damage of such lots, the town or city is liable therefor.

But suppose, as in this case, that a grade line be established, and then, before the street is graded to conform to that line, one purchases a lot on it; is he barred from damage for injury to his lot from the change of grade? His grantor, owning before the paper grade, would not be. Shall he be, simply because he purchased? If so, the one is prevented from selling; the other, from buying. The actual change may never be made. The case of *City of Denver v. Vernia*, 8 Colo. 399, (8 Pac. 656) so holds. But I do not think this can be shown by other cases. It is not the making of the paper grade that inflicts the injury, but its application to the ground. It is the direct physical disturbance of a right which the owner had enjoyed in connection with his property that gives action. *Rigney v. City of Chicago*, 102 Ill. 64 (point 6), approved by Justice Harlan in *City of Chicago v. Taylor*, 125 U. S. 160 (8 Sup. Ct. 820.) See *Eachus v. Railway Co.*, 103 Cal. 614 (37 Pac. 750); *Ogden v. Philadelphia*, 143 Pa. St. 430, (22 Atl. 694); *Brown v. City of Lowell*, 8 Mete. (Mass.) 172; Dill. Mun. Corp. 1225, note. In *Jones v. Borough of Bangor*, 144 Pa. St. 638 (23 Atl. 252,) it was held that it is the physical, not the paper, change which confers the right to damages, and that the damages belong to him who is owner at the time of actual grading; and it is further held, when one becomes owner after the municipality has ordained a change in the grade, the fact that his purchase

is made with the knowledge and understanding, on the part of both vendor and vendee, that the street will be made eventually to conform to the new grade, does not operate to relieve the municipality from liability. In *Page v. City of Boston*, 106 Mass. 84, one purchased after an ordinance to change grade, and it was held that the purchaser could sue, and was the right one to sue, for damages; he owning at the date of the work. Lewis, Em. Dom. § 667.

How is it as to buildings erected after the city has adopted grade lines? The owner erects them with his eyes open to them. The city has the undisputed right to adopt them. If it could not, it would not be able, under such a constitutional provision, to protect itself against immense damages. It may adopt them, and every one must conform to them, however inconvenient. It is a law-making power. The city cannot grade all streets to the line at once. In *Graff v. Philadelphia*, 150 Pa. St. 594, (24 Atl. 1048,) it was held that, where an owner erected a house on his lot after confirmation of a plan fixing the grade of a street, he was entitled to recover for injury to the lot, but not to the house. So in *Davis v. Railroad Co.*, 119 Mo. 180 (24 S. W. 777.) An ordinance of Charleston required any one about to build to get the grade from the city engineer. This is public law of the city, which every one is bound to know. So it was in Denver; and in *City of Denver v. Vernia*, 8 Colo. 399, (8. Pac. 656,) it was held that any one building must conform to the grade line, or, failing, could not recover. I remark that the city law applies to building, prohibiting the act of building without conforming to the grade line. Not so, however, as to buying lots. No prohibition or condition as to that. This is another reason for allowing recovery in one case, not in the other. Therefore, no damage could be allowed Mrs. Blair for injury to buildings. But if, in fact, the plaintiff or her husband made application to the engineer for grade, and he gave the wrong one, any damage as to her improvements, traceable and attributable to the error, would be recoverable.

What is the measure of damages in such cases? Shall there be set off against the damage benefits from the change of grade? What benefits? Benefits peculiar to

the property, as in condemnation cases, as also those received, in common with others, by this property? The courts seem to ask the question, has the plaintiff's property been damaged on the whole? If so, he gets that damage; if not, he gets nothing. I think the rule laid down in *Stewart v. Railroad Co.*, 38 W. Va. 438 (18 S. E. 604,) is applicable, and as good as we can get. The measure of damages is such a sum as will make the owner whole; that is, the depreciation of the market value of the lot caused by the change of grade. If the fair market value of the lot is as much immediately after the change of grade as immediately before, no recovery can be had. *Lewis, Em. Dom.* 471; note to *Railroad Co. v. Waldron*, 88 Am. Dec. 118; *Symonds v. Cincinnati*, 45 Am. Dec. 532. In arriving at the result it is proper to consider the expense of adjusting the property to the new grade, the cost of filling, injury to trees, or raising houses, where the damage to houses is included,—in short, all things causing a diminution in value of the property. *City of Omaha v. Kramer*, 25, Neb. 489 (41 N. W. 295); note to *Railroad Co. v. Waldron*, 88 Am. Dec. 114.

But, while damages are to be given the owner, his benefits are not to be forgotten; for we must set off benefits against damages. What benefits? Peculiar, not general, benefits; that is, not benefits which the owner derives from the improvement in common with the public at large, but only such benefits in respect to his property as the law calls "peculiar benefits," since for the general benefits the owner pays taxes along with others. *Kanawha Co. v. Turner*, 9 Leigh, 313; *Railroad Co. v. Foreman*, 24 W. Va. 662. But the question of what are peculiar benefits is one of difficulty. They are said to be those that particularly and exclusively affect the particular property. This is as near a definition as we can give, but does not solve the exact question in this case. The authorities conflict, or are indefinite. Now, we can clearly say that, if the market value of the property is as much after the improvement as before, no damages can be recovered. But if we apply this rule, we inevitably charge benefits that are given the property by the improvements which are not confined peculiarly to it alone, but benefits which all the property along the line of improvement derives; for, in

fixing the market value after the improvement, it seems impossible to eliminate the advantage conferred on it by the improvement. The market value is its value with that improvement. We must therefore say whether we can charge against damages, not merely benefits limited only to the particular property, as the drainage of a swamp, or greatly better access to it, but also the enhancement of value merely from the property's being on the line of improvement, and enjoyed by it only in common with those along the line of improvement or in close proximity. A street is made where none was before, or is greatly improved, or a road is made through lands before without one, and property along the street or road is greatly enhanced in value, so that it is worth at least as much, yea, more than before. But all persons along the street or road are alike benefitted. Shall we take such enhancement of value into consideration? The better opinion is that we must. Indeed, how can we help it, by what process, when we hold that, if the value afterwards is as much as before, no recovery for damages can be had? Many authorities tell us that we must consider as general benefits,—and not charge against the owner,—not only benefits throughout the city or town, but also benefits common to all persons along the line of the improvement. Likely we must so construe *Kanawha Co. v. Turner*, 9 Leigh, 313, and *Railroad Co. v. Foreman*, 24 W. Va. 662. But in *Muire v. Falconer*, 10 Grat. 17, the opinion says the jury must “show a just regard to the advantages resulting from the passing of the road through the land,” and that the advantages to be excluded are those “derived to the owner in common with the country at large,” thus not excluding from consideration those advantages directly conferred on property along the line of the improvement; leading us to infer they ought to be deducted from the damages. So in *Mitchell v. Thornton*, 21 Grat. 179. So in *Kanawha Co. v. Turner*, 9 Leigh, 313, the words “country at large” are used, but the case seems to exclude benefits immediately from the work, shared by all along it. In Illinois the constitution on this subject is like ours. Ours was borrowed from it. In the recent well-considered case of *Railway Co. v. Stickney*, 150 Ill. 362, (37 N. E. 1099), it was held that “if property is enhanced in value by reason

of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefitted and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to a greater or less degree, be likewise specially benefitted. In other words, it is not such benefits as are special to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value—that is, specially benefitted—that are to be considered.” And also that, “if a piece of property is enhanced in value, its enhancement—or, in other words, benefits to the property—can not be said to be common to any other property especially enhanced in value, and it is thus specially benefitted within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties.” It is further there held that, where “general benefits,” or “benefits in common,” and such expressions, are used in the books, it is meant “those general, intangible benefits supposed to flow to the general public from a public improvement. Thus, the paving of a street in a city may confer special benefits on properties near it by an increase in their value, and at the same time, by the convenience afforded the general public, confer general benefit; and so a railroad through a town or the country may be a general benefit, by giving additional facilities for travel and commerce, and thereby be a benefit to the community at large. But the effect of such general benefits upon any particular piece of property would be impossible of ascertainment, and speculative; and it has always been held that such benefits are not to be considered for that reason.” And, also, it was held that “the damage contemplated by the constitution is an actual diminution of the present value or price caused by the construction of the road, or a physical injury to the property that renders it of less value in the market if offered for sale. The test of whether damages have accrued to the land not taken is whether there has been a diminution in its market value by reason of the proposed improvement. The effect upon the whole tract remaining after part is taken must be considered.” And also that

"the consideration of benefits by which the land not taken is increased, instead of being diminished, in value, is not the deduction of benefits or advantages from the damages, but it is ascertaining whether there is damage or not. It is but the estimation of damages, and seems to be the only just mode of estimating them. If the property is worth as much after the improvement as before, then there is no damage done to same. If the benefits received from the making of the improvement are equal to or greater than the loss, then the property is not damaged for public use. There can be no damage to property without pecuniary loss. If there is no depreciation in value, there is no damage." We think these principles sound. They are supported by eminent authority. *Bohm v. Railroad Co.*, 129 N. Y. 576, (29 N. E. 802); *City of Atlanta v. Green*, 67 Ga. 386; *Aswell v. Scranton*, 175 Pa. St. 173 (52 Am. St. R. 841).

What is said above touching the principles of the case renders unnecessary detailed discussion of instructions. Plaintiff's No. 1 was covered by Nos. 3 and 9 given. I think Nos. 1 and 6 are good. They mention no benefits, it is true, but correctly announce the general proposition that plaintiff, if in fact damaged, is to be made whole. Their ignoring benefits was cured by instructions given for defendant. Plaintiff's Nos. 4, 5 and 7 are bad, under principles stated above, as they ignore benefits to the property from the improvement, simply because like benefits accrue to other property along the street. No. 8 is bad, because it ignores the effect of the establishment of the grade line of 1872. All are bad, because they include lot and buildings, when buildings should be excluded, if built after the establishment of grade line. Defendant's instructions Nos. 1 and 2 are bad; the others, good. Instructions Nos. 1 and 4 of defendant erroneously tell the jury that the grade line would debar recovery both for lot and improvements. Plaintiff's exception to the rejection of evidence of the cost of foundation of storehouse, erected, not only after the city adopted the system of grade lines, but after work had been begun to conform Morris street to its grade, is not tenable.

There is no error in allowing the question, "Tell the jury what effect, if any, the improvement of Morris street in front of this property of Mrs. Blair's had upon

the value of the property,—whether it is worth more or less after the improvement than it was before.” I do not understand that the objection is because it is opinion. As it is a question of value, opinion evidence is admissible. *Railroad Co. v. Foreman*, 24 W. Va. 662; *Hargreaves v. Kimberly*, 26 W. Va. 787 (point 7); *State v. Welch*, 36 W. Va. 690 (15 S. E. 419).

Because of the vice in defendant's instructions 1 and 4, making the 1872 grade line deny all claim for damage to the lot, the judgment is reversed, and a new trial awarded.

DENT, JUDGE: (*concurring*).

My worthy associate has made use of the following language in his opinion, which seems to me tends to confusion, to-wit: “The question is the value of the property less special benefits to the property, but not less general benefits shared in common with other property in the neighborhood. * * * It is not right to charge general benefits, and thus make one man pay for what the whole community enjoys.” This is the rule that applies to the ascertainment of the damages in condemnation proceedings to the residue of the property not taken, and contravenes the rule in *Stewart v. Railroad Co.*, 38 W. Va. 438 (18 S. E. 604), applicable to the ascertainment of damages where no part of the property is taken. In condemnation proceedings, the enhanced and prospective value of the property is excluded by the provisions of the statute, from the estimate, for the reason that it is a mere matter of conjecture, and is enjoyed by all property owners, generally, along the line of the road, and in the neighborhood alike. It cannot be considered, though the property may be valuable timber, mineral and coal lands, worth a few cents per acre before the taking and one thousand dollars per acre after the taking. *Railroad Co. v. Foreman*, 24 W. Va. 662; 2 Dill. Mun. Corp. p. 735, § 625, note 1. Such rule does not apply to cases where no part of the property is taken. The damages are not assessed until the improvement is completed. Then the enhanced value by reason thereof is not a matter of uncertainty, but fixed and determined, and it is nothing more than right and in perfect accord with natural justice that he who asks pay for damages suffered should be willing to give credit for bene-

fits received. If he takes with one hand, he should be willing to give with the other. If, to save a man's life, his leg is broken, he ought not to recover for the broken leg, unless the value thereof exceeds that of his life. And when a persons property is damaged that it may be improved, he should be willing to allow for such improvements in his attempt to recover damages. Hence the rule in *Stewart v. Railroad Co.*, above, that "if the fair market value of the abutting property is as much immediately after the construction of the railroads as it was immediately before such improvement was made, no damages are sustained for which a recovery can be had." By this rule all benefits to the property, local or general, by which its market value is kept up or increased, are necessarily taken into consideration; and it is simply impossible to observe or preserve such rule, and exclude from the estimate any value giving benefits. The question is, what is the actual loss to the market value of the property? If there is none, then no damage has been sustained, and no recovery can be had.

Reversed.

Spring = Special Term, 1897.

CHARLESTON.

BANK OF RAVENSWOOD v. HAMILTON *et al.*

Submitted January 14, 1897—Decided March 15, 1897.

1. CONTINUANCE—*Motion for Continuance—Sound Discretion.*

A motion for a continuance is addressed to the sound discretion of the trial court, and, unless it is plainly apparent that such discretion has been abused, this Court will not interfere therewith. (p. 76.)

2. SPECIAL ISSUES—*Waiver—Jury.*

The special issue required to be submitted to the jury by the court under section 6, chapter 96, Code, may be waived by the litigants, and the issues submitted to the court in lieu of a jury; and in such case neither party can afterwards complain that such special issue was not directed. (p. 78.)

43	75
47	124
43	75
50	319
43	75
51	479
43	75
56	189
56	445
43	75
58	551
43	75
163	417
43	75
64	223

Error to Circuit Court, Jackson county.

Assumpsit by the Bank of Ravenswood against A. Hamilton and others. There was judgment for plaintiff, and defendants bring error.

Affirmed.

C. E. Hogg for plaintiff in error.

W. A. PARSONS for defendant in error.

DENT, JUDGE:

In the case of the Bank of Ravenswood against A. Hamilton *et al.*, being a writ of error from the judgment of the Circuit Court of Jackson county in favor of the plaintiffs against the defendants upon a negotiable note for the sum of four hundred and seventy-seven dollars and forty-nine cents, the following are the only errors presented for consideration: (1) The refusal to grant a continuance on affidavit filed. (2) The trial by the court, by agreement of parties, of the matter of usuary on a statutory plea in the absence of a formulated issue under section 6, chapter 96, Code. A motion for continuance is addressed to the sound discretion of the trial court, and, unless it plainly appears that such discretion has been abused, this Court will not interfere therewith. *Marmet Co. v. Archibald*, 37 Va. 778 (17 S. E. 299); *Piott v. Com.*, 12 Gratt. 576; *Buster v. Holland*, 27 W. Va. 511; *Dimmy v. Railroad Co.*, Id. 32; *Riddle v. McGinnis*, 22 W. Va. 254. The amendment of a pleading at any time during the progress of a case is not sufficient ground for continuance unless it becomes necessary to promote the ends of justice, and secure a fair trial of the issues. The affidavit relied on is as follows, to wit: "State of West Virginia, Jackson County, to wit: Before the undersigned authority this day personally appeared A. Hamilton, who, being first duly sworn, says that he is one of the defendants in the two cases pending in the Circuit Court of said county wherein the Bank of Ravenswood is the plaintiff, and in each of said actions he has in part a good defense, the extent of which defense this affiant is unable at this time to state; but to a large part of the demands sued on in said actions he has a good and valid defense, and, if oppor-

tunity is afforded him until the next term of this Court, he will be able to make such defense to said actions. The affiant says that the reason that he is not prepared now to make such defense to said actions is that he relied exclusively upon the insufficiency of the declarations filed in said actions by the plaintiff, and fully believed, upon the advice of his counsel, that no judgment could be taken on said declarations, at this term; and plaintiff relied upon his demurrer to said declarations, and each of them, in said actions as a sufficient defence thereto, not thinking or believing that he would be required at this term of the court to make any other or different defense to said actions than that raised and afforded by his demurrer to the declarations in the said actions, and was so advised by his counsel. Affiant says that after filing his demurrer to said declarations, and the law arising thereon being argued by counsel and considered by the court, that they, the said demurrers, were sustained by the court; and thereupon the plaintiff in said actions asked leave of the court to amend its said declarations at bar, and leave to make such amendments was by the court granted, and the said declarations were amended in the important particulars shown by the orders of this Court. Affiant says that before said amendments were made there was no cause of action, as this affiant is advised, stated against this affiant in said declarations, or either of them; but affiant says that since said amendments he believes, upon the advice of his counsel, that the plaintiff has stated in its declarations a cause of action against this affiant. This affiant says that if he is now forced into trial upon the new issue necessarily raised by the said declarations as amended at this term of the court that he will be deprived of making his said defense to the said actions, or either of them. Affiant further says that if he is given until the next term of court to prepare his defense to said actions, that he will be prepared to defeat in large part the demands sued on in said actions; and that this application for a continuance of the said causes is not made for delay, but in the interest of justice. A. Hamilton."

The amendment to the declaration was merely supplying the formal parts of a declaration in *assumpsit* in no

manner affecting the cause of action, and, without then asking for continuance, the parties made up the issues; the real and only issue in fact being the question of usury, which did not go to the whole demand, but only to an uncertain part thereof. The affidavit does not disclose the extent of the defense, but evidently avoids doing so, and it is therefore evasive and insufficient. Nor does it show, except impliedly and evasively, that the affiant could not be ready for immediate trial of the issue, or even give any sufficient reason for a postponement. There is no claim of the absence of any necessary witness or paper, or any just reason given for surprise. The insincerity and concealment of the affidavit are too apparent to need comment. It is skillfully drafted, so as to reveal nothing to the court except the mere opinion of the affiant that he has a just defense to part of the demand, and, if given time, he will be able to present and sustain it. It was therefore properly disregarded by the court. The pleadings as to usury were made up in accordance with section 6, chapter 96, Code. But it is insisted that the court erred in not directing "a special issue to try and ascertain (1) whether or not the contract, assurance, or other writing is usurious; (2) if usurious, to what extent; (3) whether or not the interest has been paid on said contract, assurance, or other writing above 6 per cent., and, if so, to what extent." This provision was palpably intended to apply to jury trials alone, and not to cases wherein a jury is waived, and the court, by agreement of parties, is substituted to try the issues. Parties litigant may waive the formalities of law, and when this has been done in good faith they cannot afterwards complain that such formalities have not been complied with. *State v. Brookover*, 42 W. Va. 292 (26 S. E. 174.) The issue was usury. The court found against it. The evidence is not certified, and hence it must be presumed that, so far as the evidence was concerned, the finding was right. And this ended the controversy; for, the first finding having been adverse to defendants' plea, it became unnecessary for the court to inquire as to the extent or payment of usury that did not exist. The judgment being without apparent error, is affirmed.

Affirmed.

CHARLESTON.

BANK OF SPENCER v. SIMMONS, *et al.*

Submitted January 14, 1897—Decided March 15, 1897.

43	79
57	6
57	622

1. ACTION FOR USE—*Negotiable Note—Endorsement.*

Where a negotiable note is made payable at a particular bank, and such bank is also made payee, and said note is indorsed in blank by a third party, and a fourth party, on the day of the execution of said note, becomes the owner thereof, by paying the maker the cash therefor, and before maturity said note is indorsed to said bank for collection, and is subsequently duly protested for non-payment, said fourth party may sue in the name of the bank for his use and benefit, and recover judgment against said maker and indorser. (p. 82.)

2. NEGOTIABLE NOTE—*Ownership.*

The possession of a bill or note which is payable to bearer or indorsed in blank is *prima facie* evidence of ownership, and also that the holder received it upon a valuable consideration, paid therefor in the usual course of trade or business. (p. 83.)

Error to Circuit Court, Roane county.

Action by the Bank of Spencer, to the use of A. D. Ferrell, against G. B. Simmons and W. S. Simmons. Judgment for plaintiff, and defendant William S. Simmons brought error.

Affirmed.

SCHILLING & STARKEY for plaintiff in error.

WALTER PENDLETON for defendant in error.

ENGLISH, PRESIDENT :

On the 15th day of February, 1895, one G. B. Simmons executed a note in the following words and figures: "\$500.00. Spencer, W. Va., Feb. 15th, 1895. Ninety days after, I promise to pay to the Bank of Spencer five hundred dollars, negotiable and payable at the Bank of Spencer. Value received. (Renewal.) G. B. Simmons,"—on which note are the following indorsements: "W. S. Simmons." "For collection for account of myself in Bank of Spencer, A. D. Ferrell." On the 18th day of May, 1895, said note was duly protested on non-payment. On the 8th day of June, 1895, an action of debt was instituted in the circuit court of

Roane county by the Bank of Spencer, a corporation under the laws of West Virginia, which sued for the use and benefit of A. D. Ferrell, on said note, against G. B. Simmons and W. S. Simmons. A demurrer to the plaintiff's declaration was interposed, which was considered by the court, and overruled. The defendant, W. S. Simmons, pleaded *nil debet*, and issue was joined thereon, and the matters of law and fact were, by agreement of parties, submitted to the court; and, the court having heard the evidence and argument of counsel thereon, the said G. B. Simmons allowed judgment to go against him by default, and the court found for the plaintiff the sum of five hundred and eight dollars and ninety cents, and gave judgment for the plaintiff for the use of said A. D. Ferrell for that sum, against the defendants, with interest from the date of said judgment and costs. The defendant, W. S. Simmons, moved the court to set aside said judgment, and grant him a new trial, because the same was contrary to the law and the evidence, and was not warranted by the evidence, which motion was overruled; and the said W. S. Simmons excepted, and asked that the evidence be certified, which was accordingly done, and the said defendant obtained this writ of error.

The first error assigned and relied upon is that the declaration was not sufficient, because it does not allege that the note was not delivered to the plaintiff, or that the same was indorsed to the plaintiff; but upon this point we find that 1 Daniel, Neg. Inst. § 63, states that "it is not necessary to aver the delivery of a bill or note, for the averment that a bill was drawn or a note made includes the idea of a delivery, without which the drawing or making is not complete." The declaration in this case avers that the said G. B. Simmons made his certain note in writing, *etc.*, and that the said W. S. Simmons afterwards, and before the said note became due and payable, according to the tenor and effect thereof, to wit: on the day and year last aforesaid, indorsed the said note, whereby he then and there ordered and appointed the sum of money therein specified to be paid to the said Bank of Spencer, *etc.* This we regard as sufficient, without alleging the delivery of the note to the payee. See Chit. Bills & N. (7th Am. Ed.) p. 360, where the author says: "It is not necessary to

allege as part of the plaintiff's title that the bill, *etc.*, was delivered to him, as the allegation that the bill was payable to the payee or that an indorsement was made includes it," citing *Churchill v. Gardner*, 7 Term R. 596; *Smith v. McClure*, 5 East 477. So, in the case of *Railroad Co. v. Lickiss*, 72 Ill, 522, it was held that, "in declaring upon an indorsed promissory note, an averment that the payee indorsed the note to the plaintiff is sufficient, without averring a delivery. The averment that the payee indorsed the note to the plaintiff imports a delivery." The leading English case on this point is that of *Churchill v. Gardner*, *supra*, where it is held that "it is not necessary in a declaration on a bill of exchange to aver that the maker delivered it; it is sufficient to state that he made it." These authorities we regard as amply sufficient to show that the circuit court committed no error in overruling the demurrer to the plaintiff's declaration, for the reason that it fails to allege that the note sued on was delivered to the plaintiff.

The next assignment of error relied on by the plaintiff in error is that the evidence in this case clearly shows that there was no consideration from the plaintiff to the maker or the indorser of the note in controversy, and therefore the judgment should have been in favor of the plaintiff in error, instead of against him; that, as between the maker or indorser and the payee, the true state of the case may be shown, and the presumption of consideration rebutted; that this suit is between the payee in the note and the indorser, and therefore the rights of a *bona fide* holder for value and before maturity do not arise. Now, section 11 of chapter 99 of our Code provides that, "upon any such note which on its face is payable at a particular bank or a particular office thereof for discount and deposit, or at the place of business of a savings institution or savings bank, and upon any bill of exchange whether such note or bill be payable in or out of this state, if the same be protested, an action of debt or *assumpsit* may be maintained, and judgment given jointly against all liable by virtue thereof, whether drawers, endorsers or acceptors, or against any one of any intermediate number of them for the principal and charges of protest, with interest thereon from the date of such protest." Now, this note was made by G. B. Sim-

mons, and was payable ninety days after date to the Bank of Spencer, for five hundred dollars, negotiable and payable at the Bank of Spencer, for value received, and was indorsed in blank by the plaintiff in error, W. S. Simmons. The evidence shows that A. D. Ferrell became the owner of the note before maturity; that no part of it had been paid, and that A. D. Ferrell had indorsed said note to the Bank of Spencer for collection; that, on the day the note was made, the defendant G. B. Simmons, brought the same to said Ferrell, and got the money of him for it. So it does appear affirmatively that said A. D. Ferrell paid a valuable consideration for said note, and in the case of *Ritchie v. Moore*, 5 Munf. 388, it was held by the court of appeals of Virginia that the holder of a bill of exchange, with several indorsements in blanks, has the right to strike out the names of the indorsers subsequent to the first, and to write over the name of the first indorser an assignment to himself, or the bill, without such assignment, will be considered as his property, by his having it in his power to make it. And we find the law thus stated in 2 pars. Bills & N. p, 443; "An agent who holds a bill or note payable to bearer, or indorsed in blank, or to whom it has been indorsed for the purpose of collection, may sue on it in his own name." Now, the note in the case we are considering was made payable to the Bank of Spencer, and was indorsed by the plaintiff in error, with a view, no doubt, of having the note discounted at said bank; but said A. D. Ferrell paid the maker of said note the money thereon before maturity, and thereby became the owner thereof, and, being such owner, indorsed the same to said bank for collection; and, as we have seen, a note held by an agent, to whom it has been indorsed in blank, or to whom it has been endorsed for collection, may sue on it in his own name, and, that being the case, he surely can sue on it for the use and benefit of the true owner. In 2 Rob. Prac. p. 229, we find the law stated thus: "The beneficial owner of a bill of exchange or negotiable note, which is payable to bearer or is indorsed in blank, may, says Walworth, Ch., institute a suit thereon in a court of law, in the name of any one who is willing to allow his name to be used for that purpose; and, where the defendant has no legal or equitable defense to the bill

or note as against the real owner thereof, he cannot be permitted to show that the nominal plaintiff, in whose name the suit is so brought, is not the real party in interest,"—citing *Morton v. Rogers*, 14 Wend. 580, where it is further held that "the possession of a bill or note which is payable to bearer, or indorsed in blank, is *prima facie* evidence of ownership, and also that the holder received it upon a valuable consideration paid therefor in the usual course of trade or business. As a general rule, therefore, even where there is a failure of consideration or other equitable defense as between the defendant and the drawee or payee of the bill or note or his immediate indorser, he cannot call upon the plaintiff to prove when or upon what consideration the bill or note upon which the suit is brought was transferred to him, or how it came into his hands,"—citing *Byles, Bills*, 61.

In the light of these authorities, we must hold that the second assignment of error is not well taken, and as the above authorities show, as we think, that the suit was properly brought in the name of the Bank of Spencer, for the use and benefit of A. D. Ferrell, and as it clearly appears from the testimony that A. D. Ferrell was the *bona fide* owner of the note sued on, having purchased the same and paid for it on the day it was made, and that the bank to whom the note was payable never discounted the same, the said A. D. Ferrell had the right to institute suit in the name of said bank (which was the payee named therein), for his use and benefit, and to prosecute the same to judgment in his favor. And we find the law stated on this question (*Wood, Byles, Bills*, side p. 121) as follows: "If a man seek to enforce a simple contract, he must in pleading, aver that it was made on good consideration, and must substantiate that allegation by proof. But to this rule bills and notes are an exception. It is never necessary to aver consideration for any engagement on a bill or note, or to prove the existence of such consideration, unless a presumption against it be raised by the evidence of the adverse party, or unless it appear that injustice will be done to the defendant, or that the law will be violated if the plaintiff recover." None of these things, however, appear in this case, and we conclude, therefore, that the third and fourth assignments of error suggest nothing that

would entitle the plaintiff to a reversal of the judgment complained of.

For these reasons, the judgment must be affirmed, with costs and damages.

Affirmed.

CHARLESTON.

COALDALE MINING & MANUFACTURING Co. v. CLARK *et al.*

Submitted January 25, 1897—Decided March 15, 1897.

1. MINING LEASE—*Construction of Lease—Royalty.*

T. leases from C. and others a tract of land for the purpose of mining and shipping coal therefrom, and assigns the lease to the C. M. & M. Co. The lease provides a royalty or rental to the lessors of ten cents for every ton of two thousand pounds of coal which should pass over the screen mentioned in the lease, and five cents per ton for every ton which passed through the screen, and which should be shipped from the demised premises; and it further provides that the lessee should pay to the lessors the sum of three thousand dollars annually as a minimum rental thereunder, whether the quantity of coal produced that amount of rental or not. A distress warrant being sworn out, then a receiver appointed, the works were closed, with five months' rental unpaid, for which time the royalty on the coal actually mined amounted to one hundred dollars per month, making in all five hundred dollars, which amount was decreed to the lessors. *Held*, that the true amount due the lessors was five-twelfths of three thousand dollars, or one thousand two and fifty dollars, which should have been decreed to them for unpaid royalty. (p. 88.)

2. DEED OF TRUST—*Decree—Error.*

A coal company operating mines, with assets exceeding its liabilities by at least five thousand dollars, or twenty-five *per cent.*, its assets consisting of a good plant for operating its works, with approved machinery and outfit, and a favorable contract for the sale of its whole output, and executing a deed of trust to secure the sum of six thousand dollars on its leasehold and all its property, four thousand and five hundred dollars of which is, at the time of the execution of the trust, money advanced for machinery and improving the works, and the principal part of the residue of fifteen hundred dollars being for royalty due to that date, said six thousand dollars being a part of the liabilities, it is error to decree the insolvency of

the company, and to declare the deed of trust a general assignment for the benefit of all the creditors of said company. (p. 89.)

3. DECREE—*Equity—Pleading.*

There can be no decree without allegations in the pleadings to support it. (p. 89.)

Appeal from Circuit Court, Wayne county.

Bill by the Coaldale Mining & Manufacturing Company against E. W. Clark and others. Decree for plaintiff, and defendants appeal.

Reversed.

J. S. CLARK and VINSON & THOMPSON, for appellants.

McWHORTER, JUDGE :

On the 13th day of February, 1892, H. J. Toudy took from E. W. Clark and others, trustees, a lease in writing of one thousand and five hundred acres of land in Wayne county, W. Va., for the purpose of mining and shipping coal. By the terms of the lease it was provided, among other things, that the royalty or rental to be paid was ten cents for each and every ton of two thousand pounds of coal passing over a screen described in the lease, and five cents per ton for every ton which passed through the screen, and which should be shipped from the demised premises. And it was further provided and agreed that the lessee should pay to the lessors the sum of three thousand dollars annually from the completion of the railroad to the leased premises during the continuance of the lease, as a minimum rental thereunder, whether the quantity of coal produced that amount of rental or not. On the 1st day of March, 1892, the lessee, H. J. Toudy, with the consent of the lessors, made in writing, transferred and assigned the said lease, with all his "rights, titles, and interest and privileges" thereunder to the Coaldale Mining & Manufacturing Company, which assignment was duly accepted by said company. On the 13th day of May, 1893, the said Coaldale Mining & Manufacturing Company executed a deed of trust to Stephen E. Haas, trustee, conveying the said lease, together with all the tenements, machinery, buildings, improvements, *etc.*, placed on said leased premises, to secure to E. W. Clark and others, trustees, the sum of six thousand dollars, with interest at the rate of

six *per centum* per annum, to be paid to said trustees, their successors, heirs, or assigns, on or before the 15th day of May, 1898, in the following manner, to-wit: ten cents per ton for every ton of coal mined from the leasehold premises from and after the 1st day of November, 1893, the payments to be made on the 20th day of the months of January, April, July, and October in each year, each of said payments to be for the coal mined during the three calendar months immediately preceding the 1st of the month in which said payment was to be made until the whole of said six thousand dollars should be paid; and the interest was to be paid quarterly at the same times; and it was further provided that, in default of said quarterly payments of principal or interest, the said *cestuis que trustent* should have the right to declare the whole of said six thousand dollars or so much thereof as should then remain unpaid, to be due and payable, and require the trustee to proceed to sell under the trust deed, according to the terms thereof.

It appears from the evidence in the cause that the six thousand dollars secured by said trust deed was represented by cash advanced at the time four thousand and five hundred dollars, and about one thousand and five hundred dollars, the amount of rental or royalty on coal mined up to that time, and other small accounts due from the company. On July 13, 1893, the said E. W. Clark and others, trustees, caused a distress warrant to be sued out against and levied upon the property of the Coaldale Mining & Manufacturing Company "for the sum of two thousand and three hundred and seventy-two dollars and eighteen cents, balance of rent due and in arrears under the contract of lease." On July 14, 1893, the Coaldale Mining & Manufacturing Company filed its bill of complaint in the circuit court of Wayne county, alleging its inability to pay its creditors in full, owing to the financial stringency of the times, the suing out of the distress warrant, *etc.*, and praying for the appointment of a receiver to preserve the property, and protect it from waste and destruction; and on the same day (July 14th) the judge of said circuit court, in vacation, appointed H. J. Toudy receiver of said company. October 2, 1893, the receiver filed his report, which showed the assets as of July 15, 1893, to amount to the sum

of twenty-one thousand six hundred and thirty-six dollars and twenty-four cents, and the liabilities to the sum of sixteen thousand five hundred and thirty-two dollars and ten cents, which liabilities included the sum of six thousand dollars secured by the trust deed, as well as an item of three thousand dollars for rent. And the record shows that at the date of the execution of the trust deed of May 13, 1893, the assets were substantially the same as of said July 15th, and the liabilities something less than on July 15, 1893. On the 2d day of October, 1893, the defendants E. W. Clark and others, trustees, filed their joint answer to complainant's bill in the nature of a cross bill setting up their trust deed for six thousand dollars, and their distress warrant aforesaid, and denying that the coal operations could be carried on by a receiver of the court at a profit at the time for reasons alleged, and averring that because of the perishable nature of the personal property used in the operations of the mines, *etc.*, it would be to the interest of the plaintiff and every one else in interest to have the receiver discharged, and the property sold. On the 3d day of October, 1893, Jones, Wilter & Co., Henking, Bovie & Co., and E. E. Shedd & Sons filed their several petitions, setting up their respective claims, and pursuant to the prayer of the petitioners the court filed and treated them as the answers of the several petitioners as defendants to plaintiff's bill. These petitions are all in the same form, and contain the same allegations, and the only allegations or averments in all the pleadings in the cause charging fraud or misconduct on the part of the plaintiff company, or any other company, or any other party to the suit, are contained in the following words of the several petitions: "Your petitioner, further answering, says: That it is untrue, as alleged in plaintiff's said bill, that it was necessary that a receiver should be appointed to take charge of the plant and business of the said plaintiff, and conduct and operate the same, in order that all its creditors should be protected, and have their claims fully satisfied; but avers that no necessity in fact existed, and that said allegation was made and used as a subterfuge, and with the intention to hinder, delay, and defraud its creditors, and especially this petitioner, in the collection of the claims and demands against it. This pe-

tioner further avers that the said plaintiff and the said defendants E. W. Clark *et al.*, trustee of the Guyandotte Coal Land Association, upon whose lands the plaintiff holds its said lease, conspired together and with each other for the purpose of hindering, delaying, and defrauding the other creditors of said plaintiff, and especially this petitioner, and the result of said conspiracy was the institution of this suit, and the appointment of H. J. Toudy, the general manager and one of the stockholders of the plaintiff, to be its receiver." Various other petitions were filed, merely setting up claims against the company, and at the same time an order was made directing a sale of the property, and referring the cause to a commissioner to take, state, and report an account ascertaining the assets of the company "at the date of the deed of assignment referred to in the bill herein, and the value thereof," the debts due from the plaintiff, the nature and character thereof and to whom due, and the liens against said property and priority thereof, and for statement of receiver's account. An amended bill was filed, making all the creditors of the company parties. On the coming in of the master's report and the report of the sale of the property, the court, on the 8th day of February, 1895, entered the decree complained of.

The court erred in reducing the claim of appellants for rent to the sum of five hundred dollars, but the error was not to the extent claimed by the appellants. It appears from the evidence of H. J. Toudy—the only witness examined in the cause—that the royalty owed by the company up to the date of the deed of trust, May 13, 1893, was represented in the six thousand dollars secured by said trust deed. Hence the court should have ascertained the rent to be still due and owing to the appellants, not one hundred dollars per month,—being the royalty on the actual amount of coal mined from the time of the execution of the deed of trust until the closing down of the coal works, five months (the average royalty amounting to about one hundred dollars per month, as stated in the testimony of the witness Toudy),—but the sum of one thousand, two hundred and fifty dollars, being five-twelfths of the minimum of three thousand dollars annual rental under the lease, to which the appellants (lessors) are clear-

ly entitled as a lien prior to all others upon the company's property.

The second error assigned is that "the court erred in not declaring appellants entitled to a lien by virtue of the trust deed prior to all other creditors for the amount of money actually loaned to the company, to wit: the sum of four thousand and five hundred dollars." The court erred: (a) In declaring the Coaldale Mining & Manufacturing Company insolvent at the time of the execution of the trust deed to secure the sum of six thousand dollars on the 13th day of May, 1893, it being clearly shown by the record that at that time its assets exceeded its liabilities by at least five thousand dollars, or twenty-five per cent.; its assets consisting of a good plant for operating its works, with approved machinery and outfit, and a favorable contract for the sale of its whole output. As to what constitutes insolvency "is not a matter capable of exact definition by general rule for all cases, as each case must rest on its own facts, and on the statute or purpose for which we would define it." *Wolf v. McGugin*, 37 W. Va. 552, (16 S. E. 797)—where the question of insolvency is fully discussed. See pages 556-558, 37 W. Va., and pages 798, 799, 16 S. E., and cases there cited. (b) In decreeing the trust deed of May 13, 1893, to be an assignment for the benefit of all the then existing creditors of the company. The sum of six thousand dollars secured by said trust deed, consisting of four thousand and five hundred dollars in cash advanced to improve the plant and works of the company; and the principal part of the residue of one thousand and five hundred dollars being for royalty due up to that time, which constituted the first lien upon the company's property, by operation of statute, is held to be a valid and subsisting lien upon the company's property, there being no attack upon said deed of trust, and no evidence or pretense that any part thereof has ever been paid. "There can be no decree without allegations in the pleadings to support it." *Shoe Co. v. Haught*, 41 W. Va. 275 (23 S. E. 553); *Roberts v. Coleman*, 37 W. Va. 143 (16 S. E. 482).

The decree complained of, rendered on the 8th day of February, 1895, is reversed as far as it relates to the first lien for rental or royalty, and to the said deed of trust of

May 13, 1893, and the cause remanded, with directions to reform the same to conform to the principles above laid down.

Reversed.

CHARLESTON.

NEALE *et al*. v. COUNTY COURT OF WOOD COUNTY *et al*.

Submitted February 5, 1897—Decided March 15, 1897.

1. CONSTITUTIONAL LAW—*Railroad Aid—Magisterial Districts.*

Section 24 of chapter 39 and section 57 of chapter 54 of the Code of 1891, in allowing subscriptions by magisterial districts in aid of railroads and other works of internal improvement, are not unconstitutional, and such subscriptions are valid. (p. 92.)

2. COUNTY INDEBTEDNESS—*Magisterial Districts—Railroad Aid.*

A magisterial district cannot, by subscription to works of internal improvement, become indebted up to five *per cent.* of its taxable property, and, in addition, the county up to five *per cent.* of its whole taxable property; but such district subscription, for the purposes of the limitation upon county indebtedness fixed by section 8, article X, of the Constitution, is to be regarded as county indebtedness, and included with other county indebtedness in determining whether the total county indebtedness will exceed that limitation. (p. 92.)

3. TAX LEVIES—*Magisterial Districts—Railroad Aid.*

Levies made by the county court to pay such district subscription must be limited to property within such district. (p. 103.)

4. BONDS—*Railroad Aid—Delivery of Bonds.*

The provision in section 57, chapter 54, Code 1891, that if a railroad corporation fail to construct its road according to its charter public subscriptions shall be void, does not make the completion of such road a condition precedent to the delivery of bonds under such subscriptions. That may, however, be made a condition precedent by the terms of the subscription. (p. 102.)

5. BONDS—*Railroad Aid—Issuance of Bonds—Injunction.*

The terms and conditions as to the issuance of bonds under a public subscription to works of internal improvement contained in the proposition of subscription approved by the popular vote cannot be changed or departed from, and the

43	90
146	464
43	90
47	277
43	90
56	552

43	90
163	233
163	245

issuance of bonds contrary to such terms and conditions may be enjoined by taxpayers. (p. 108.)

6. BONDS—*Railroad Aid—Sinking Fund.*

It is not indispensable that the elements or outlines of a sinking fund for the discharge of bonds to be issued under a public subscription to works of internal improvement shall be incorporated in the order or proposition submitting the question of subscription to popular vote. Such sinking fund should be provided after the actual incurrence of the subscription debt. (p. 105.)

7. BONDS—*Railroad Aid—Issuance of Bonds—Injunction.*

Public subscriptions to works of internal improvement must be paid in bonds, and such bonds cannot be issued and sold in advance of the proper time for delivery, under such subscription, and the money paid into the public treasury, to be held and afterwards paid under such subscriptions. Such issuance and sale of bonds may be enjoined. (p. 107.)

8. INJUNCTION—*Motion to Dissolve Injunction—Error.*

Where an injunction, as awarded, is too broad, but the facts call for a more limited one, on a motion to dissolve, the injunction should be modified, and made one warranted by the bill; and it is error to wholly overrule the motion to dissolve, and allow the excessive injunction to continue. (p. 109.)

Appeal from Circuit Court, Wood county.

Bill by Joseph B. Neale and others against the county court of Wood county, the Little Kanawha Railroad Company, and others. Decree for plaintiffs, and the defendant railroad company appeals.

Modified.

V. B. ARCHER, for appellant.

VAN WINKLE & AMBLER, W. P. HUBBARD and H. H. MOSS, for appellees.

BRANNON, JUDGE:

Under an order of the County Court of Wood county submitting to the voters of Parkersburg district the question of a subscription of one hundred and seventy-five thousand dollars to the stock of the Little Kanawha Railroad Company, the voters of that district approved the proposition; and the county court appointed J. M. Jackson agent to make the subscription, and he did make it, upon conditions prescribed by the court orders; and then Joseph B. Neale and other taxpayers sued out an injunc-

tion against the issue of bonds and further proceedings in consummation of the subscription; and, a motion to dissolve the injunction having been overruled, the Little Kanawha Railroad Company has appealed to this Court.

The first point made against this subscription is that a mere magisterial district has no capacity to make such subscription, and that the clauses of section 24 chapter 39, and section 57 chapter 54 of the Code of 1891, allowing such subscription, are unconstitutional. Virginia's history and laws tell us of that colossal debt which for so many years has rested upon her like an incubus, exhausting her tax resources, retarding her progress, deterring immigration, and constituting a stigma upon her great name and honor. Her lamentable example in this respect was before the authors of the State of West Virginia; and they took pains to forbid such calamity to the new state, by tying the hands of the legislature or any authority, by the provision in her first Constitution that no debt "shall be contracted by this state" except in a few specified cases, and the provision that the state should not lend its credit to, or assume the debts of, any county, city, town, township, corporation, or person. That protected the people against the incurrence of debt by the state, but there was no barrier against counties and cities and townships; and as in this state multiplying instances of acts authorizing cities, counties and townships to subscribe large sums in aid of railroads warned our people of the danger of burdensome indebtedness in that quarter, the framers of the Constitution of 1872 not only repeated the bar against state debt found in the Constitution of 1863, but provided in section 8, article X, that "no county, city, school district or municipal corporation * * * shall hereafter be allowed to become indebted, in any manner or for any purpose, to an amount * * * exceeding five *per cent.* on the value of taxable property therein." Plainly, this speaks a denial of the capacity of counties, school districts and municipal corporations to incur debt beyond a certain limit; but does it deny the power of a magisterial district, as a separate, distinct entity or body, to become indebted at all? It does not do so in terms, but does it do so by implication? Things are sometimes included in, sometimes excluded from, statutes and

constitutions, though not mentioned. *Brown v. Gates*, 15 W. Va. 131; *Page v. Allen*, 58 Pa. St. 338. Remember that this section was intended as a barrier against onerous local indebtedness, and can we think that while erecting such a barrier against counties, school districts, and municipal corporations, none at all was intended as to magisterial districts? The danger of indebtedness there was just as great as in the instances named. Magisterial districts were not unknown to the authors of the Constitution, as it provides for their formation as well as it provides for school districts; and, if it was designed to give magisterial districts power to run in debt at all, why were they not named along with school districts? It is an obvious instance for the rule, "The expression of one thing is the exclusion of the other." The framers of the Constitution having selected certain ones of the territorial subdivisions, and specified them in this provision, intended to exclude others. It may be said, however, that this provision only prohibits counties, school districts, and municipal corporations from incurring debt beyond a limit, and prohibits only them, and does not touch magisterial districts; in other words, that its function is not to enable counties, school districts, and municipal corporations to incur debt, but only to restrict them in its amount,—that its only mission is to disable them, not to enable them. I construe this clause as one of both enablement and disablement; that is, its purpose is to enable counties, school districts, and municipal corporation to incur debt, and to disable all other subdivisions from doing so. Is it reasonable to say that it was the design to limit counties, school districts, and municipal corporations in their capacity to incur debts, and leave magisterial and senatorial districts unlimited? I think not, because that would defeat the manifest purpose of protecting the people against debt beyond that limit; for if we say that this clause performs the single function of merely limiting counties, school districts, and municipal corporations in power to incur debt, and they only are named, the magisterial and senatorial districts, not being named, may, under legislative sanction, become indebted without limit. We must then say that the Constitution closes certain doors against danger, yet leaves others open to the same danger. It is true that

after empowering counties, school districts, and municipal corporations to incur debt, the section does not, in words, declare an affirmative prohibition against magisterial districts so doing; but that is plainly meant. Would you say that a senatorial district could become indebted? Surely not. It is merely a territorial area made for the election of senators, just as a magisterial district is a territorial area for the election of justices and constables. They are of the same nature, in being merely territorial or political divisions for the election of officers, and in the fact that neither has any other entity or existence, corporate or otherwise. Our most solemn acts, our constitutions, statutes and deeds, do not always, in express words, cover every case or point arising in the shifting current of human affairs; but we must take their language, place ourselves in the position of those who made them, consider what matters they were dealing with, the circumstances surrounding them, the ends to be accomplished, the things evidently meant, and, doing this,—seeing from this Constitution how careful and anxious were its framers to set up bars against destructive indebtedness and exhaustive taxation,—it is out of the question to suppose that they ever dreamed that these magisterial districts, or any other districts than those they named, could be authorized to incur debt. They intended to protect the people against themselves and the legislature,—to tie the hands of both from suicidal acts,—and now to allow these magisterial districts this large liberty would open the way wide to the very evil sought to be warded off. The state is absolutely forbidden to aid corporations or persons in internal improvements. Counties and municipal corporations can do so only to a certain extent. But let this Court say that magisterial districts may do so, and almost every district in the state would be tempted, in the spirit of improvement, to lend its credit to railroads and other works, entailing a mountain of debt on the public. Pertinent, if not pointedly, supporting the construction of the clause of the Constitution involved,—that it, by plain implication, denies the power to create a debt in any other than the instances named,—is the case in the United States supreme court affirming the decision of the Illinois supreme court in *Weightman v. Clark*, 103 U. S. 258. There was in-

volved a clause in the Illinois constitution that "the corporate authorities of counties, townships, school districts, cities and towns may be vested with power to assess taxes for corporate purposes"; and it was held that power to tax could not be granted other authorities than the ones named. Another consideration bearing on the construction of this clause, tending to show that no other subdivisions than those named were intended to have debt-making power, is that it is improbable that any subdivision or district of territory would be given power to make a debt without power of taxation to pay it, as it would have no other means of payment. Where is there authority in magisterial districts to tax? The Constitution gives the power of taxation to state, counties, school districts, and municipal corporations, but not to magisterial districts. Those three are corporations, under the Constitution and statutes executing it, having officers, courts, and boards to govern them, possessing taxing power, while a magisterial district has no rulers, is without that artificial personality possessed by a corporation,—a legal nonentity, a merely physical and political subdivision of the county's territory, made for the purpose of electing certain officers, just as a judicial circuit or senatorial district is made merely for the election of certain officers.

In *Gilkeson v. Frederick Justices*, 13 Grat. 577, 583, recognizing the right of the legislature to delegate the power of taxation, it is contemplated that it can only be granted to county courts "and other organized bodies." In *Webb v. Lafayette Co.*, 67 Mo. 353, under a provision in the constitution that the legislature should not authorize "any county, city or town to become stockholder" in a corporation, unless upon a certain vote, one reason given for holding an act unconstitutional authorizing a township to subscribe is that it was only a territorial subdivision, having no corporate character. In *Harshman v. Bates Co.*, 92 U. S. 569, the same act was held unconstitutional because of the vote required by the act being less than the Missouri constitution required, but the opinion questions the power to allow such townships to subscribe. Though in the later case of *Cass Co. v. Johnson*, 95 U. S. 360, the same act was held valid, and the former decision reversed, it was not because it was held that such town-

ship could be given such authority, but as the State Supreme Court had not found the act void for want of such vote. This was before the case of *Webb v. Lafayette Co.* I do not deny the power of the legislature to delegate the power to tax to counties and other organized bodies. It is well settled. *Bull v. Read*, 13 Grat. 78, 99; *Gilkeson v. Frederick Justices*, Id. 584; point 7 in *List v. Wheeling*, 7 W. Va. 504. When, however, the constitution prescribes where the taxing power shall reside,—in what bodies,—this great and dangerous function cannot be delegated to others. It will be found that our Constitution is careful in its bestowal of this power, declaring what bodies may exercise it, and the expression of one thing in the constitution is exclusive of things not expressed; and this is especially true of provisions declaratory in their nature. Denials of powers by implication are equally as strong as by expression, if the purpose be plain. *Page v. Allen*, 98 Am. Dec. 272. I have now no desire to retract the declaration made in *Brannon v. County Court*, 33 W. Va. 789 (11 S. E. 34), that I knew of no taxing powers under our Constitution but state, counties, school districts, and municipal corporations; and, though not necessary to the decision of this case, I do not think the legislature could impart to magisterial districts taxing power, wide as is its taxing power, because the Constitution has pointed out the agencies to which it may delegate its taxing powers, has pointed out the authorities to wield this power, and impliedly negatived the power to give it to others. If such were not the cast of our Constitution, I should not say so. *Weightman v. Clark*, 103 U. S. 258; *Marshall v. Silliman*, 61 Ill. 218; *Desty, Tax'n*, 253, 255, 479. The legislature has not granted taxing power to magisterial districts, but I use this view to show that, as the Constitution does not contemplate that magisterial districts shall exercise taxing power, so neither does it contemplate that they shall, as separate, independent entities, create indebtedness, since, if it had intended to give the power to create indebtedness, it would have provided for taxing power to discharge that indebtedness. I shall use no effort to show that a school district, though it may be composed of the same territory as a magisterial district, is not the same as the

latter district. In powers and nature they are wholly distinct. Hence the words "school district," in section 8, article X, of the Constitution, do not mean magisterial district. This is not claimed. Such a district is for educational purposes only. The statute allowing "districts" to subscribe to works of internal improvement does not have reference to school districts, and no law authorizes them to so subscribe.

I have endeavored to show that such district can not, as a separate body, create a debt. This is an important matter, because, if it could do so, then also could the county, school district and municipal corporation each impose its separate indebtedness, making four debt-creating agencies, whereas three only are contemplated by section 8, article X. This doubling would be unconstitutional. Indeed, the able attorney has, in argument in this court defending this subscription, virtually abandoned that as a warrant for it, though the answers relied on it, and places his defense of it on the contention that, though not strictly a county subscription, yet it is a debt allowed as a county debt under section 8, article X. Let us dispose of this question next. Code, c. 39, s. 24, and section 57 of chapter 54, provides that, when the county court of any county deems it desirable for any district to aid in the construction of a railroad or work of internal improvement, the court may submit the question to a vote in that district; and upon its approval by the voters the court shall cause subscription to be made in the name of the district, and the right to the stock shall be vested in the district. By chapter 54, section 57, the court is to appoint an agent to make the subscription; and its president and clerk are to sign the bonds and annex the seal of the county, and the court levies taxes on the district to pay them. Now, I suppose it may be said that the legislature has power to declare what shall be accounted a county debt under the clause in section 8, article X, of the Constitution, allowing a county debt, so as to enable it to give the impress or cast of county indebtedness under that clause to a district subscription. The features of the statutes just mentioned seem to intend to give that impress of character to such a debt. The district is an integral part of the county. Its police and fiscal affairs are included therein. And the

county court has jurisdiction and control over the fiscal affairs of the county, and necessarily of the district, as a part of it, and because the district has no local officers or government, and the county court performs all its functions, it is for it to allow or refuse a vote of subscription. A railroad is a highway. The establishment of highways or avenues of passage concerns the police power, and the matter of subscription and taxation concerns the fiscal function, and these powers are within the jurisdiction of the county court. They relate to the concerns and well-being of the county, and, though in instances relating more directly to a section or district, they are none the less matters of internal affairs and police and fiscal concerns of the county. If we do not give the act allowing district subscription to railroads this construction, ranking it under the head and character of county indebtedness, under section 8, article X, of the Constitution, and not as a separate, distinct district indebtedness, the act would be unconstitutional, and we must, if possible, give it that meaning and construction which will harmonize it with the Constitution; and, though there is question as to the meaning or proper construction of a statute, we may give it a construction not at first view most obvious or natural, in order to make it consistent with the Constitution. *Slack v. Jacob*, 8 W. Va. 612. There are features of this legislation putting on such subscription the stamp of a county act; others, that of a district act,—the one valid, the other invalid. The highest court in the land has given to subscriptions to railroads by unincorporated precincts the character of county action, as contradistinguished from precinct action; holding that on such bonds action can be against the county, though the county can levy for their payment on the property of the precinct. Chief Justice Waite, in *Davenport v. Dodge Co.*, 105 U. S. 237, said: "A bond implies an obligor bound to do what it is agreed shall be done. Precincts in Nebraska are but political subdivisions of a county. They have no corporate existence and can not contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of precincts for political, administrative, and judicial purposes, but they are in no sense the representatives of the people of the terri-

tory as a municipality. *Stats v. Dodge Co.*, 10 Neb. 20 (4 N. W. 370). Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the state. Their relation to a county is like that of a ward to a city. Having no corporate existence, no separate municipal authority, they can not, says again the supreme court of the state in the case last cited, 'enter into contracts, directly or indirectly, nor assume obligations which a court might be called on to enforce.' Hence the precinct cannot become the obligor of precinct bonds, and we think it follows that the county, which does not have a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty, not only of issuing the bonds, but of providing for the payment of them, is the political entity bound by the obligation, and charged with the debt created thereby. The only difference between the two kinds of debt is that in one all the taxable property of the county is charged with its payment, and in the other only a part. In both the *mandamus* to enforce the levy and collection of the necessary taxes lies to the proper officers of the county alone. This remedy is expressly provided for, and thus the presumption that might otherwise arise of an intention to erect the precinct into a corporation for the purpose of these obligations, because, without it, the bonds could not be enforced, is rebutted. We think, therefore, that the special bonds which the county commissioners are to issue for the precincts are, in legal effect, the special bonds of the county, payable out of a special fund to be raised in a special way. Although the form of expression in the Nebraska statute is somewhat different from that in Missouri, which we were called on to consider in *Cass Co. v. Johnston*, 95 U. S. 360, we think the legal effect of it is the same. In Missouri it was provided that the bonds should be in the name of the county, but in Nebraska there can be no bond except it be of the county; and, as a bond is to be made, it necessarily follows that the county must make it. In express terms it is stated that the precinct bonds shall be the same as other bonds,—that is to say, county bonds,—but must contain a statement of their special nature, which confines the area of taxable property to a part, rather than the whole, of the county. If there

is nothing else in the case, therefore, we think it comes within *Cass Co. v. Johnston*, *supra*, and that an action at law will lie in the courts of the United States against the county for the recovery of the special judgment asked for. *County Com'rs v. Chandler*, 96 U. S. 205, was upon coupons attached to some of this same issue of bonds. Judgment had been rendered against the county in the court below, and that judgment was affirmed here. No one seemed to think then that the defense now relied on was good, for it was not mentioned in this court or below. The defense then made related only to the authority of a precinct to vote aid for the building of a toll bridge." "Although in such a bond and its coupons the precinct is the promisor, a suit to recover on such coupons is properly brought against the county. Where such bonds purport on their face to be issued by the board of county commissioners on behalf of the precinct, and are signed by the chairman of the board and attested by its clerk, who is also the clerk of the county, and are sealed with the seal of the county, and the coupons are signed by such clerk, and the bonds refer to the coupons as annexed, the bonds and coupons are issued by the county commissioners." *Blair v. Cuming Co.*, 111 U. S. 363 syl. (4. Sup. Ct., 449). The same question was again brought before the United States supreme court in a suit to enforce payment of coupons on certain bonds issued by Nemaha county on behalf of Brownsville precinct in said county. The second point in the syllabus in this case is as follows: "It has been settled by this court in *Davenport v. Dodge Co.*, 105 U. S. 237, and *Blair v. Cuming Co.*, 111 U. S. 363 (4 Sup. Ct. 449), that coupons like those sued on in this case are obligations of the county, and that an action may be maintained against the county upon them."

Our own decision in *Brannon v. County Court*, 33 W. Va. 789, (11 S. E. 34) is cited by counsel as pointedly sustaining this theory. It holds that those taxes laid by a county court for roads under chapter 35, Acts 1881, in a district, are taxes assessed by county authorities, within the meaning of section 7, article X, of the Constitution, providing that county authorities shall never assess taxes in one year in the aggregate exceeding ninety-five *per cent.* on the one hundred dollars valuation. Those taxes

are levied, not for purposes of the whole county, but only of one district; and yet we considered them as taxes to be added up with general county levy for county purposes, thus treating them as county taxes in character. That classification is supported in our unorganized districts by *Wright v. Railway Co.*, 120 Ill. 541, (12 N. E. 240). It is to be understood that, rating such district subscription as county subscription, there can not be distinctively a county subscription,—that is, one for the whole county up to five *per cent.* of its taxable property, and, besides, a subscription for a district up to five *per cent.* of its taxable property,—but both must be added to ascertain the limit of subscription. It is argued that arguments of inconvenience will repel this construction. It is said that one district will be at the mercy of the county court and other districts. In some instances this may be so. But the county court controls the fiscal and internal affairs of the county. It can judge when a proposed subscription is advisable or not, and whether one district ought, as respects others, to be allowed to absorb, or to say how far it may absorb, the sum of indebtedness within the competency of the county. Parkersburg district includes the important city of Parkersburg. Its needs may be such as to justify this preference. Other districts do not so much need railroads. Whether the public weal calls for leave to this district to make a debt largely absorbing the debt capacity of the county is for the discretion of its court. I assert not that this position is conclusively plain, beyond the possibility of different opinions; but it is reasonably so, is fraught with no public harm, is the only one on which to sustain the legislature's act, and has the support of the United States Supreme Court, and maintains the public honor and faith in many instances in which such bonds have already been issued in good faith and put on the market, and citizens have bought them in good faith, and their money has gone to the public benefit. I think the first authority for districts to so subscribe was in chapter 114, Acts 1872-73, and legislature after legislature has continued and several times re-enacted that authority, thus giving the Constitution a legislative construction for a quarter of a century, and thousands of dollars of honorable engagement rest upon it, so that this Court should be very slow

to revolutionize this long-continued legislative sanction, and entail great losses upon innocent people. If I were very clear and settled in mind, above reasonable question, as I must be to overthrow an act of the legislature, I would not hesitate to do so at the bidding of the Constitution; but surely I am not clear in that direction, and, on the contrary, I think the act can be sustained very plausibly on the ground above given.

It is argued that, if suit on the bonds becomes necessary, it would be a *mandamus* against the county court, and, if it be regarded as county indebtedness, it would logically bind the entire county, and that this can not be so; but I answer that we regard it as county indebtedness, not for every purpose, but only for the question in hand. The *mandamus* would compel a levy only on property within the district, as such is the contract between debtor and creditor, that being the letter of the bond and law. Code 1891, chapter 54, section 59. *Railway Co. v. Tribble*, 25 S. C. 260, is cited for the proposition that a tax voted by the people of a township to aid construction of a railroad is not a state, county, or municipal tax. There a manufacturing company sought to have such tax refunded under an act directing such companies to be repaid "state, county and municipal taxes." That case presented the question whether, for the particular purpose of the act to refund, it was the ordinary county or municipal tax, and the court said it was not such a tax, but a special or extraordinary tax designed for specific local improvement, not contemplated in the passage of the refunding act. And, moreover, a township is there a corporation levying a tax.

We therefore decide that said statutory provisions authorizing district subscriptions are constitutional and valid, and such district subscriptions valid.

Another objection to this subscription is that section 57, chapter 54, Code, says that, if a "corporation forfeit its charter or fail to construct its railroad according to the provisions of its charter, the subscription so made shall be void," and that the completion of the road is a condition precedent to the issue of bonds, and that as this railroad is chartered to run from Parkersburg to Burnsville, and has not even been begun, the bonds can not be

delivered, and as the order submitting the subscription provides for delivery of half the bonds on the completion of seven miles, and the other half on the completing of seven miles more, it is invalid. Did the legislature intend to make the completion of the road a condition precedent to the delivery of the bonds? This is purely a question of intention, whether it arise under an act of the legislature, deed, or otherwise. A condition precedent is one that must happen or be performed before the estate or right can vest. A condition subsequent is one by the failure or nonperformance of which an estate or right will be defeated. 2 Minor, Inst. 261. Did the legislature intend by the provision above stated that a railroad must be completed in its whole length before bonds can be delivered? I think not. The very object of the subscription in the words of section 24, chapter 39, is to "aid in construction," and in most cases such bonds are indispensable to the prosecution of the work. True, it may be that the subscription by the agent, binding the county court to deliver the bonds on completion, can be said to "aid in the construction" of the road, as meant in section 24, as it gives the enterprise the credit of that subscription; but practically few investors would trust to that mere subscription, and themselves subscribe and pay, leaving the county or city yet to pay. Now, the county subscribing is a stockholder generally from the subscription by the agent, the court appoints proxies to represent the stock in stockholder's meetings, the law provides that such subscription shall be paid in the bonds of the county, and the directors may call for payments on stock from time to time; and I suppose a county would be subject to such calls, like any other stockholder, so the terms of its subscription be not violated. The statute does not make different special provisions as to public subscriptions, and therefore presumably intended these general ones to apply to them. So I do not think that the provision above makes the completion of the road a condition precedent to the issuance of the bonds, but they may be issued as provided in the proposition submitted to the vote. Were the completion of the road a condition precedent to the issuance of the bonds, it being a condition made by the law authorizing the bonds, it might be said that it would affect the bonds in the hands of *bona fide*

holders, as all must notice the law allowing the bonds to issue. *Citizens' Saving & Loan Ass'n v. Perry Co.*, 156 U. S. 692 (15 Sup. Ct. 547); note to *Jones v. City of Camden* (S. C.) 51 Am. St. Rep. 831, 838, 845 (s. c. 23 S. E. 141); *Portsmouth Sav. Bank v. Village of Ashley* (Mich.) 52 N. W. 74; *Barnett v. Denison*, 145 U. S. 139 (12 Supt. Ct. 819); *Barnum v. Okolona*, 148 U. S. 393 (13 Sup. Ct. 638). Where completion is a precedent condition, it is strictly enforced. Note to *De Voss v. City of Richmond*, 98 Am. Dec. 675. But this is not a question between the holders of bonds and the district, but one between the original parties,—the district and company: and, clearly, if the completion of the work were a condition precedent, the issue of the bonds could be restrained, so they could not involve the district with innocent purchasers. *Ravenswood, S. & G. Ry. Co. v. Town of Ravenswood*, 41 W. Va. 732 (24 S. E. 597); *Jones, Ry. Secur.* §§ 267, 268; *Steines v. Franklin Co.*, 8 Am. Rep. 87; *Belo v. Commissioners*, 76 N. C. 489. See note to *De Voss v. City of Richmond*, 98 Am. Dec. 664, and to *Jones v. City of Camden* (S. C.) 51 Am. St. Rep. 822 (s. c. 23 S. E. 141), for full discussion of municipal subscriptions and bonds. What would be the effect upon the bonds, when issued, of the failure to complete the road, is a question not before this Court.

Another point made by counsel against the subscription is that chapter 39, section 24, Code 1891, says that, when a county court deems it desirable for the county or district to subscribe in aid of the construction of a railroad, it may submit the question to a vote of the people; and it is contended that the order of submission must affirmatively declare the fact that the court does deem it desirable that the county or district should subscribe, and that this order does not do so. It would seem to be technical, to an extreme, to nullify a subscription for this cause. The very order submitting the question imports that the court deems it desirable that the subscription be made; at least, that it is a proper case for the submission of the matter to the popular decision, which is all I think the clause means. If it did not regard it a proper instance for submission to a vote, it would not submit it, we may assume. That order alone implies that the court has passed on the fact that it deemed it desirable to aid the public work. It implies,

that the court has taken that matter into consideration, ascertained the facts, and decided that a proper case existed for the submission of the subscription to the people. Does the statute say it must in words so declare? Not at all. That lies behind its judgment; that is, behind its order for a vote. As well say that a court in ordinary cases must find all facts preliminary to final judgment, and state them in detail as reasons for its judgment.

Another point made against the subscription is that the proposition, as submitted to a vote, contained no provision for a sinking fund. The Constitution, in article X, section 8, allows a county, school district, or municipal corporation to become indebted to a certain extent, but provides that it shall not do so "without, at the same time, providing for the collection of a direct annual tax sufficient to pay annually the interest on such debt and the principal thereof, within and not exceeding thirty-four years; provided, that no debt shall be contracted under this section, unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same." The first provision quoted is said to require the creation of a sinking fund for the discharge of the debt created by the subscription within a period correspondent with the pay day of the bonds. Assuming such to be its construction, the legislature has enacted in section 59, chapter 54, Code 1891, that at the time the annual levy of any such county, city, town, or village is laid, there shall be a tax levied to pay the annual interest of the bonds, and to create a sinking fund to pay the principal when due. This is the only statute law to execute the clause of the Constitution in hand. It was within the power of the legislature to make regulation herein. The question then comes up, when must provision be made for such sinking fund? Of course, the actual creation of it cannot be ordered at the date of the order submitting the subscription to the people, since there is no debt at that date. The Constitution uses the words "at the same time"; that is, at the date when an actual debt is incurred binding the subscribing body. The statute says "at the time of the annual levy," meaning at the levy term after the actual incurrence of such a debt. No debt exists from the order submitting the

subscription to vote, none from even the vote sanctioning the subscription, nor even a declaration of the result of the vote by the county court. No debt exists until the court shall, by its agent, make under its order an actual subscription. Until then the court may recede from the proposition. Until then there is no contract. Section 2, *List v. Wheeling*, 7 W. Va. 501; 15 Am. Eng. Enc. Law, 1259. In this instance, as the bonds were not to be delivered until work of construction had been done, which might never be done, until then there could be no delivery or debt in existence, and until then no sinking fund could be actually established.

I have just stated when the creation of the sinking fund ought to be made though I think it can be made later, if not then made; but this does not meet the objection made by counsel, I concede, because, while the actual creation of the sinking fund need not be made until the actual legal existence of the debt, yet it can be outlined as an element in the order proposing the subscription; and the question comes up whether or no that order must outline a proposed sinking fund as a matter to be approved by the people as an integral element of the subscription, to meet that clause of the Constitution which requires that all questions connected with the incurrence of the debt shall be submitted to the popular vote. I do not think it an essential or indispensable part of the order of submission. It relates to the payment, rather than the incurrence, of the debt, and is designed for the benefit of the bondholder, as an actual provision and guaranty of payment. It is not essential for the voters, because the law and the order of the court tell them that payment is to be made in bonds bearing a certain interest, payable at a certain time; and it is not essential, perhaps not practicable, to tell them in advance just how much is to be raised per year, or what rate of tax is to be imposed per year, to meet interest and principal. Such detail is not meant by the Constitution. They are told what debt is to be incurred, its amount, its interest, that it is to be paid in bonds, and the day of their payment, all the features of the obligation to be imposed on them, and it is the questions or matters entering into the burden they will assume that are meant by the Constitution when it says all questions

touching the incurrence of the debt shall be voted upon; for the very language of the Constitution warrants us in saying that they are questions pertinent to the creation of the debt that are here referred to, not such details of its payment as the outlining of a sinking fund. That is a mere provision for payment after the creation of the debt, and is left to the county court's later action. The people have authorized the court to go on and incur the debt, and of course, as a consequence, leave to it the establishment of a sinking fund as a means to an end authorized; that is, the payment of such debt.

Counsel makes the point that, while the order of the court submitting the subscription to a vote prescribes that it is to be paid in bonds, yet a later order authorizing the subscription to be made does not specify that it is payable in bonds, but both orders are to be read together, and one in terms says, as does the statute, that it shall be paid in bonds, and the later order speaks of bonds and their delivery, and thus, in effect, says so; and, besides, the written subscription by J. M. Jackson, agent of the court, to make the subscription, makes it upon the terms and conditions in said orders stated, and it incorporates in the written subscription, as part of it, the order of May 6, 1896, which in terms makes it payable in bonds. Therefore we reach the conclusion that said subscription is not unconstitutional or void, but valid.

Another question remains to be disposed of. It is this: The order of the county court of May 6, 1896, submitting to a vote the question whether the subscription should be made, declared that a conditional subscription should be made on these conditions, as conditions precedent; that is to say, that before the subscription should take effect, or any bonds be delivered or money paid, the railroad company must construct its road, ready for rolling stock, from a point at or near the Ohio river, by a certain route, for a distance of seven miles, when one-half the bonds were to be delivered to the company, and the other half on such construction to the Wood county line, a further distance of seven miles, and also locate and construct its depots and general offices in Parkersburg, and its shops in or adjacent to that city. It further declared that, if there should be failure to construct the road for three years from the elec-

tion, then the subscription should be void. The county court, in its order of 9th June, 1896, incorporated those conditions, but inserted a clause to the effect that as it had been suggested that the bonds could at once be negotiated to the governor of the state, at par, for state purposes, such conditions should in such event be modified so as to permit the agent of the court to convert them into money, to be placed with the county treasurer as a special railroad fund to the credit of the county court, to be paid to the company according to the terms of the subscription, in lieu of bonds. For reasons very apparent, this provision, not present in the proposition for subscription ratified by the people, but first known in this subsequent order, is a departure in material respects from the proposition submitted to the people. They never assented to what this clause calls for. Not a particle of work of construction had been done on the railroad. "The time, terms, and conditions of municipal aid bonds depend wholly on the consent of the voters. Such conditions cannot be changed." This is stated as law in Judge Dent's opinion in *Ravenswood S. & G. Ry. Co. v. Town of Ravenswood*, 41 W. Va. 736 (24 S. E. 597). See also *Citizens' Saving & Loan Ass'n v. Perry Co.* 156 U. S. 692 (15 Sup. Ct. 547). Whatever might be the rights of the state, or any one else, had these bonds been issued under this amendment,—a question not before us,—it is plain that their issue under it could be enjoined, because it would increase the burden on the taxpayers beyond what was contemplated by their vote, since they provided that the bonds should not be delivered until the road should be built, and as a consequence they would date and bear interest only from actual delivery. But this premature issue, if not void, would bind them to interest from a prior date, and it would place the public in danger of paying the bonds, whereas, if there should be failure to construct the road and depot and shops as stipulated, the bonds would not be delivered, and no debt created. It is true, this clause in the court order allowing immediate sale of the bonds did not allow the railroad company to have the money until it complied with the terms of the subscription; but it created a bonded debt, drawing interest, before a spade had been put in the ground in the work of construction, whereas the contract

was for delivery of bonds after certain work done, bearing interest from then, and a sale prematurely created a debt, when it might be that none would ever arise if the conditions of the vote be followed. That vote was to deliver the bonds of the company to pay subscription, in certain events, not to sell them and put the money in the treasury, to bear no interest to offset interest on the bonds, or be lost by embezzlement, misappropriation from its proper purpose, or other chance of time. The statute, the only chart of procedure in such case, provides no right to sell the bonds, but negatives it, by commanding that they shall be delivered to the company in payment of subscription. True, the answers allege that when this suit was brought there was no intention on the part of the governor or the board of the irreducible school fund or the county court to sell the bonds for the benefit of that fund, and that all negotiation looking to such sale of the bonds had been abandoned, and that that provision of the order was no longer intended to be carried out. This is, however, new matter denied by replication, and not proven. And there stands the order of the court allowing a sale to the governor for the school fund, or to any one else, yet in force, liable to be carried out any time. The answer of the county court is no repeal of it, nor an estoppel against its execution. At the date of the institution of this suit, before the answer announced the abandonment of that clause in the order, there it stood, unwarranted by law, and fraught with danger. These public subscriptions creating heavy indebtedness, while often conducive to public interest, in the promotion of internal improvements, are often of doubtful expediency; and the courts must be careful in rigidly observing the safeguards of the law relating to them, and the conditions and limitations fixed by the people.

The bill did not pray a limited injunction against the premature negotiation of these bonds only, but, resting on the theory that the subscription was *in toto* void, prayed for a total injunction against the consummation of the subscription by the issuance of any bonds under it, and that the orders of the county court relating to it and the act of subscription, be decreed void; and an injunction, as so prayed, was allowed, and a motion to dissolve it was

wholly overruled. That injunction was erroneous, because too broad. It should have been limited to the restraint of the execution of the clause of the county court order allowing the immediate sale of the bonds, and, when the court passed on the motion to dissolve, it should have modified the injunction. *Bettman v. Harness*, 42 W. Va. 433 (26 S. E. 271). Some cases hold an excessive injunction void; but, as the facts of the bill entitle the plaintiffs to such limited injunction under the prayer for general relief, we will not turn them out of court only to come back for a limited injunction, but will reverse the order wholly overruling the motion to dissolve, and will modify the injunction so that it shall enjoin any sale of said bonds under the clause inserted in the order of the county court of the 9th day of July, 1896, allowing the immediate sale of said bonds, and perpetuating such limited injunction, and dissolving the injunction as awarded by the circuit judge, and dismissing the bill as to all further purposes.

Modified.

CHARLESTON.

McCREERY'S ADM'X v. OHIO RIVER R. Co.

Submitted January 21, 1897—Decided March 17, 1897.

INSTRUCTIONS—*Injury to Employee—Contributory Negligence—Error.*

When contributory negligence is relied on in defense of an action for wrongful injury or death, a hypothetical instruction directing a finding in favor of plaintiff, which omits any reference to the facts tending to establish contributory negligence, and entirely ignores such defense, is erroneous. Nor can such error be cured by other instructions given in behalf of either party. (p. 116.)

Error to Circuit Court, Cabell county.

Action by James McCreery's administratrix against the Ohio River Railroad Company. Judgment for four thousand and two hundred dollars for plaintiff, and defendant brings error.

Reversed.

43	110
43	445
43	481
43	110
46	119
46	191
46	543
43	110
147	771
43	110
48	243
43	110
49	309
49	311
149	418
49	505
43	110
51	398
43	110
57	301
43	110
62	565
63	407
43	110
64	478

H. P. CAMDEN and VINSON & THOMPSON for plaintiff in error.

SIMMS & ENSLOW for defendant in error.

DENT, JUDGE :

The facts are as follows : The plaintiff's intestate, James C. McCreery, for about two years prior to April, 1893, when the accident complained of in the declaration in this case occurred, had been in the employment of the Huntington & Big Sandy Railroad Company as passenger conductor. A short time prior to the accident which resulted in his death, the Ohio River Railroad Company leased the property and franchises of the Huntington & Big Sandy Railroad Company, and continued the said McCreery in his appointment as passenger conductor on what was known as the "Dummy train," which ran between Guyandotte and Kenova. Between the two points above mentioned there is a bridge across Twelve Pole river. Some fifty or sixty feet north of this bridge there had been erected, by the contractors who constructed the bridge, a derrick, which had been used by them in raising stone during the construction of the abutments of the bridge. This derrick was not on the land of the defendant. The work on the bridge had been completed several months before the happening of the accident, and the derrick had been dismantled. On the evening before the accident occurred the derrick had been set up again and used by some one in loading some stone on cars belonging to the defendant. Half an hour before the wreck occurred, the section foreman of the petitioner passed by the derrick, and, seeing the rope attached thereto loose, had it fastened back. The train known as the "Dummy train" consists of a small engine and car, very similar to a street car, upon which McCreery had been conductor ever since the opening of the Huntington & Big Sandy Railroad. This car made at least seven round trips each day between Huntington and Kenova, passing the point of accident at least fourteen times each day. The rules of the company required that when McCreery was not engaged in collecting fares, he was to station himself in a conspicuous place on the rear of the train (if it should be running backwards), so as to

keep a constant lookout and avoid accidents. McCreery had control of this train, and could direct whether it should be run with the car in front or the engine in front. He had, however, been directed, whenever it was possible to do so, to run the train with the engine in front. The morning of the accident McCreery was running the train with the car in front. It was raining, and McCreery was inside the car. Upon the point as to whether he was keeping a lookout or not, the evidence is conflicting. This derrick which caused the accident, and the chain or rope attached thereto, might have been seen by one standing on the front of the car from a point six or seven hundred feet north of the point of the accident in favorable weather. The accident happened as follows: The boom of the derrick swung around over the railroad track, and the hook depending therefrom caught the drawbar of the front car, jerked it from the track, and threw it down an embankment about twenty-five feet in height, smashing the car to pieces, and killing the conductor. One of the nonassignable duties of a railroad company towards its employes is that of providing a reasonably safe place in which to work; in short, to keep its track clear of unnecessary obstructions. *Flannegan v. Railway Co.*, 40 W. Va. 436 (21 S. E. 1028); *Robinson v. Railroad Co.*, 40 W. Va. 583 (21 S. E. 727). And the mere fact that the boom of this derrick was permitted to swing across the tracks, forming as it did a most deadly and unnecessary obstruction, furnishes ample grounds to sustain the inference of negligence, notwithstanding the evidence that the proper employe of the company had attempted to firmly secure the boom but a short time previous. The derrick was not an obstruction itself, for it was not even dangerous. But the negligence consisted in the insecurity of the boom, which could have been so easily avoided, either by dismantling it, or fastening it back in such condition that it could not have been swung loose by the force of the wind. It is true, it might have been loosened by some person, but such is not a probable inference, so far as the evidence discloses, which, however, was a question for the jury.

The only defense is contributory negligence, the defendant insisting that the accident could have been averted had the intestate properly discharged his duties. *Ward's*

Adm'r v. Railway Co., 30 W. Va. 49, (19 S. E. 389). The intestate was acting in the capacity of both conductor and flagman on the train, and receiving pay accordingly. His duty as flagman was, when the train was running backward under his directions, to keep a lookout when not otherwise engaged, in front of the train, so as to notify the engineer of obstructions, and prevent accidents therefrom, not only for his own, but for the safety of others, and the property of the company. If this accident could have been avoided by the proper discharge on his part of this duty, then he ought not to recover, for the liabilities imposed on the company by the destruction of its property and damages occasioned to innocent passengers are already sufficient in amount, without adding thereto the life of the employe whose negligence is primarily responsible for the accident. To avoid accidents was one of the duties of his employment, and his failure to discharge such duty ought not to inure to the emolument of his beneficiaries, to the detriment of his employer. The evidence on this question is contradictory. It therefore becomes a mixed question of law and fact for the determination of the jury under instruction as to the law by the court.

At the instance of the plaintiff, the court gave the jury six instructions, to each of which the defendant objected. For obvious reasons they will be considered in their inverse order. The sixth instruction is as follows: "The court instructs the jury that it was the duty of the defendant in this case to keep its roadbed and track in a reasonably safe condition for the passage of its train along and over the same, and to keep the same clear of obstructions thereon, or in close and dangerous proximity thereto; and if the jury believe, from the evidence in this case, that there was standing near the plaintiff's railroad and track at the point where it is alleged in the declaration that the accident herein occurred, a derrick, with an arm or boom attached thereto, and that said arm or boom of said derrick was of sufficient length to swing over the roadbed or track of the defendant, and thereby endanger the passage of trains along and over said track at said point, then it was the duty of the defendant to either cause said derrick and arm or boom attached thereto to be removed, or to see that the same was kept securely fastened in such a way and

manner as not to obstruct the passage of trains along said track at said point. And that this duty be devolved upon the defendant, although said derrick may not have been upon the right of way of defendant, nor upon lands under its immediate control." The only objection urged to this instruction is the right of this company to keep a swinging boom or derrick in proximity to its track. This right is not denied by the instruction, but it simply imposes on the company the duty of keeping such swinging boom so fastened as to prevent it obstructing the track, which, of course, is right.

The fifth instruction is as follows: "The court instructs the jury that where the defense is contributory negligence on the part of the plaintiff's decedent, the burden of proving contributory negligence is on the defendant, and, to sustain it, it must have a preponderance of the evidence: i. e. it must appear from all the evidence in the case." No objection is urged against it, and apparently there is none.

The fourth instruction is as follows: "The court instructs the jury that if they find from the evidence that James C. McCreery, at the time of the accident, was standing either in the door of the front car as it was moving, or looking through the glass in the door, and that he could see ahead of the train as well as if he had been on the outside, that would be a sufficient compliance with the rule requiring him to take a conspicuous place on the front of the car." The objection to this instruction is that there was no evidence that intestate "was standing either in the door of the front car, or looking through the glass in the door." The evidence of the witness Ferguson is that the conductor was standing at the door in the west end of the car, where his duty would require him to be to keep a lookout; hence the presumption is that he was there for that purpose, and discharging his duty, in the absence of evidence to the contrary. At least this evidence tends to prove the matter of the instruction, and it was, therefore, proper for the consideration of the jury.

The third instruction is as follows: "The court instructs the jury that an employe running on the trains of the defendant has the right to presume that the roadbed is in a reasonably safe condition for the passage of its trains,

and that the mere fact that a derrick is standing by the roadside is not notice that it is dangerous, unless the employe, McCreery, in the case, had seen it upon the track, or knew it was in the habit of swinging across the track, and after such knowledge continued to run defendant's train without complaint." The objection to this instruction is as follows: "Instruction No. 3 is bad because it interprets the evidence of the jury, and tells them from what facts they may or may not infer knowledge on the part of the decedent of the danger. If the derrick or boom was swinging loose parallel to the track for some time, and the decedent saw it in that position, the jury had a right to say that was sufficient notice to him that it might swing across the track in a wind storm, whether he had ever seen it across the track or not." The objection and instruction so thoroughly correspond that it is hard to distinguish between the two in the light of the evidence. It is therefore untenable. The objector evidently does not distinguish between the standing derrick and the swinging boom that may or may not be attached thereto. The derrick itself would be no obstruction, nor would the boom, if properly secured. The negligence relates to the insecure boom, and there is no evidence that it had been swinging loose for some time. On the contrary, it is shown to have been dismantled.

The second instruction is as follows: "The court instructs the jury that, although the employe, McCreery, did in fact know of the existence of the derrick in question, and its situation with reference to the roadbed and track, yet the said McCreery had the right to presume that the defendant would keep said derrick so secured as to make it reasonably safe, or cause the same to be removed after the completion of the bridge; and it was not such negligence on the part of said McCreery to remain in the employment of said defendant as would defeat a right of recovery in this case." The same objection is urged to this instruction as to the third, and is equally untenable. The company had the right to have the derrick there, but they should have kept the boom secure, so as to prevent it becoming a dangerous nuisance to its employes using its track, and this whether owned by itself or its independent contractor doing its work; and the conductor had the right

to presume the company would do its duty in this respect. It was not one of the ordinary risks of his employment.

The first instruction is as follows: "The court instructs the jury that it is the duty of a railroad company to keep its roadbed in a reasonably safe condition, so its employes on its train may not be endangered in the discharge of their duties; and if the jury find from the evidence that the defendant allowed and permitted a derrick to stand on, or so near its right of way and roadbed, and so loosely fastened and tied that it was liable to be blown or to be swung around across the defendant's track, and thereby endanger the passage of trains and the life and limbs of employes thereon, and that said derrick did actually blow around or swing across the track, and cause the injury complained of, then you should find for the plaintiff, and assess her damages such as may seem fair and just, not exceeding \$10,000." This instruction clearly violates the rule laid down in the case of *Woodell v. Improvement Co.*, 38 W. Va. 23 (17 S. E. 386). The third syllabus is as follows: "When the court instructs the jury that, if they believe from the evidence certain hypothetical facts mentioned in the instruction, they must find for the party plaintiff or defendant, as the case may be, but omits from such statement of facts a material fact, which, being believed from the evidence, would require a different verdict, such instruction is erroneous, and, if excepted to, and not cured, is ground for reversal." This present instruction entirely omits any reference to the facts bearing on the intestate's alleged contributory negligence, and which, if established to the satisfaction of the jury, were sufficient to defeat the action.

C. E. Bryan testified that at the time he first noticed the boom across the track—which was about three hundred feet from it, and too late to stop the train at the speed it was going—the conductor was sitting at the end of the car nearest the engine, with a newspaper in his hand. If this were true, he was not at his post of duty, nor keeping a proper lookout ahead, and the jury could very well infer therefrom that, had he been discharging his duty, the accident would not have happened. But the instruction entirely ignores this fact, and, even standing by itself, takes away from the jury the question of contributory negligence, and directs

them, if they believe the defendant was negligent, as alleged, that they must find for the plaintiff. Nor could this defect be remedied by other instructions in behalf of plaintiff or defendant, as they would only tend to contradiction and confusion, and thus mislead the jury. *McKelvey v. Railroad Co.*, 35 W. Va. 500 (15 S. E. 261); *McMechen v. McMechen*, 17 W. Va 683; *Mason v. Bridge Co.*, 20 W. Va. 223; *Railroad Co. v. Sanger*, 15 Gratt. 230; *Hall v. Lyons*, 29 W. Va. 420, (1. S. E. 582). This instruction, having been given over the objection of the defendant, and being plainly erroneous, according to the former holdings of this Court, the judgment must be reversed, the verdict of the jury set aside, and a new trial awarded.

Reversed.

CHARLESTON.

McKITTRICK *et al*. v. McKITTRICK *et al*.

Submitted January 16, 1897—Decided March 17, 1897.

1. **EQUITY PRACTICE—Consolidation of Causes—Parties.**

The consolidation of causes is a matter addressed to the sound discretion of the court that tries the causes. Where the parties are the same, and separate suits have been brought in equity upon matters which might have been united in one suit, and the defense is the same in all, a consolidation rule ought to be granted. (p. 123.)

2. **ADMINISTRATION—Decree of Sale—Dower.**

When the widow is defendant in a suit brought to subject the realty of a decedent to the payment of his debts, and she has not elected to take the value of her dower in money, her dower should be assigned before an out and out sale of the realty is decreed. (p. 124.)

Appeal from Circuit Court, Putnam county.

Bill by Ellen McDonald and others against Catherine McKittrick and others, and bill by Daniel McKittrick against Catherine McKittrick and others. The suits were consolidated, and from the decree Ellen McDonald and others appeal.

Reversed.

RUFUS SWITZER for appellants.

TOMLINSON & WILEY for appellees.

ENGLISH, PRESIDENT:

At the December rules, 1884, Ellen McDonald and others filed their bill in the Circuit Court of Putnam county, against Catherine McKittrick in her own right and as administratrix of Patrick McKittrick, deceased, and all the unknown heirs of said Patrick McKittrick, C. A. Vintroux, and Rufus Switzer, trustee. The complainants allege in their bill: That Catherine McKittrick was duly appointed and qualified as administratrix of said Patrick McKittrick, her deceased husband. That the greater part of the estate of which the said Patrick McKittrick died seized consists of a valuable tract of land consisting of three hundred and twenty acres, situate in Putnam county, West Virginia, conveyed to said Patrick McKittrick by Thomas Dawkins by deed bearing date the 18th day of May, 1857, excepting a fractional piece thereof, conveyed by said Patrick McKittrick to Bishop John McKain, of Wheeling. That there were no debts against the said estate of Patrick McKittrick except one note of five hundred and twenty-two dollars and seventy-three cents, due C. A. Vintroux, and secured by deed of trust bearing date the 14th day of March, 1883, and of record in the clerk's office of the county court of Putnam county, West Virginia, in which trust deed Rufus Switzer was trustee; and a certified copy of said trust deed was exhibited with plaintiff's bill. That there were other trust deeds conveying said lands by said Patrick McKittrick in his life-time, which plaintiff's allege they are informed have been fully paid up. The one of Patrick McKittrick and wife to James W. Hoge, trustee, to secure to William E. Vintroux two hundred and twenty-one dollars and seventy-two cents, should be released, as the same debt is included in the amount secured in the trust first mentioned. That the amount secured by deed of trust to William A. Bradford, trustee, for William Henson, has long since been paid and discharged, and should be released. And complainants pray that enough of said land be sold to satisfy the debt secured by the deed of

trust of said Patrick McKittrick and wife to Rufus Switzer, trustee; that the dower of said Catherine McKittrick, widow, as aforesaid, might be laid off to her in said land, and that, if there were any other debts due from said estate, enough of the remainder of said tract be sold to pay said debts; and that if, after setting aside said dower and paying all of the indebtedness of said estate, the remainder of said land is susceptible of partition among the parties thereto, the same be so partitioned, and, if not, that the remainder of said land be sold, and the proceeds distributed among the parties in proportion to their respective interests therein, *etc*.

At the January rules, 1885, Daniel McKittrick, who sued on behalf of himself and all other creditors of Patrick McKittrick, deceased, filed his bill in said circuit court against Catherine McKittrick in her own right and as administratrix of Patrick McKittrick, deceased; C. A. Vintroux in her own right and as administratrix of William T. Vintroux, deceased; Taylor Hoge, administrator of J. W. Hoge, trustee, deceased; Rufus Switzer, trustee; L. A. Christie, administrator of William Henson, deceased; William A. Bradford, trustee; and the unknown heirs at law of Patrick McKittrick, deceased,—alleging therein: The death of Patrick McKittrick, and the appointment and qualification of said Catherine McKittrick as his administratrix. That more than six months had elapsed since the appointment and qualification of said administratrix, and that, although the estate was and is largely in debt, no suit had ever been instituted by said administratrix for the purpose of winding up and settling up said estate, and to sell said real estate belonging to said estate to pay the debts on said estate. That said Patrick McKittrick left no personal estate, but that he died seized and possessed in fee of said tract of three hundred and twenty acres near Scott depot, on the Chesapeake & Ohio Railway, in Putnam county, less a lot one hundred and sixty-two by two hundred and eight and three-fourth feet conveyed out of said tract by said Patrick to Bishop John McKain, of Wheeling, by deed dated April 29, 1876, as a site for a Catholic church; and setting forth the trust liens upon the same as stated in the other bill, and also stating which of said trust liens had been paid off and discharged, and also

stating that the estate of said Patrick McKittrick was indebted to the plaintiff, Daniel McKittrick, as follows: On account of a certain note made and executed by said Patrick in his lifetime, dated November 12, 1874, and payable to plaintiff two years after date, for the sum of two hundred dollars, with interest from the maturity thereof; and on account of a certain other note made and executed by said Patrick in his lifetime, bearing date November 1, 1876, and payable to plaintiff one year after date, for the sum of one hundred and seventy-two dollars, with interest from the maturity of said note; and on account of another note made and executed by the said Patrick, dated January 2, 1880, and payable to plaintiff, for the sum of four hundred and seventy dollars and fifty cents, and payable twelve months after date, with interest from the maturity of said note; and also on account of a certain duebill made and executed by the said Patrick, dated December 3, 1879, for six months' services and general repairs on the farm of the said Patrick performed and rendered by plaintiff of the value of five hundred dollars. That nothing has been paid on said notes or duebill by Catherine McKittrick, administratrix, or any other person, but that said debts remain wholly unpaid, and constitute a valid and subsisting charge and lien upon the estate of which the said Patrick died seised and possessed. That the personal estate of said Patrick McKittrick was wholly insufficient for the payment of his debts, and the plaintiffs prayed that all proper accounts might be taken, and that the real estate of which the said Patrick McKittrick died seised and possessed might be subjected to sale for the payment of his just debts and liabilities, and especially the aforesaid debt of plaintiff might be paid and satisfied out of the proceeds of said real estate; and for general relief, *etc*.

On the 25th day of February, 1885, in said cause of Daniel McKittrick against Catherine McKittrick, *et al*., a decree was entered referring the same to Hugh L. Judge, one of the commissioners of the court, to make and state an account showing: (1) The nature and amount of the complainant's claims against the estate of Patrick McKittrick, deceased; (2) of what estate, real, personal, and mixed, the said Patrick died seised and possessed, and what disposition, if any, had been made of said personal

estate, and the claims against, and probable value of said real estate; (3) what are the liens upon said real estate, together with their amounts and priorities; (4) whether the rents, issues and profits of said real estate will pay the liens thereon within five years. In pursuance of this decree, said H. L. Judge, commissioner, made a report on the 16th day of August, 1886, finding seventeen dollars and one cent due C. A. Vintroux, two dollars and forty-four cents due Catherine McKittrick; that the claims of the plaintiff, Daniel McKittrick, amounting to one thousand three hundred and sixty dollars and fifty-five cents, are not sustained by the evidence before him, and refusing to allow the same; that said Patrick McKittrick died seised and possessed of three hundred and nineteen acres of land worth three thousand six hundred and seventy dollars, situated in said county of Putnam; that the personal property of the said Patrick McKittrick amounted to four hundred and thirty-three dollars and eighty-three cents, which had been duly administered by his administratrix, Catherine McKittrick, leaving due her from said the before-mentioned account of two dollars and twenty-eight cents, the only lien on said real estate being a deed of trust dated the 14th day of March, 1883, conveying to Rufus Switzer, trustee, the three hundred and nineteen acre tract of land to secure to C. A. Vintroux five hundred and twenty-two dollars and seventy-three cents, which, with the accrued interest, amounted to six hundred and twenty-nine dollars and eighty-nine cents, and that the rents, issues, and profits of said real estate would not within five years discharge the indebtedness aforesaid. On the 3d of March, 1887, the case of Daniel McKittrick against Catherine McKittrick *et al.*, was heard upon the report of Commissioner H. L. Judge, and on the exceptions indorsed thereon. The court overruled said exceptions except as to one hundred and fifty dollars, as to which amount it found the plaintiff was entitled to a decree, and said report was confirmed in other respects, and the plaintiff was given judgment for said sum of one hundred and fifty dollars, with interest from the date of said decree, and directed that unless said sum was paid in thirty days from the rising of the court that said land, or so much as remains unsold, be sold by a special commissioner therein appointed, upon the

terms therein specified,—it appearing to the court from the answer of Rufus Switzer that one hundred acres of said land had been sold by him since the institution of this suit, (which answer is ordered to be filed in the papers of the cause.)

On the 3d day of March, 1888, the two causes of Daniel McKittrick against Catherine McKittrick *et al*., and Ellen McDonald *et al*. against Catherine McKittrick, *et al*., were consolidated, and it is recited in the decree rendered on that day in said consolidated causes that, it appearing that one hundred acres of the tract of land mentioned in both causes has been sold to pay off the note of C. A. Vintroux secured by deed of trust on said land, and that the judgment of the plaintiff in the first cause above named is a lien on the balance of said land, and that the plaintiffs in the second cause above named are entitled to have said tract of land sold (subject to the widow's dower), and the proceeds applied to the judgment aforesaid and costs of the first suit, and the balance of the proceeds arising from said sale distributed among the heirs at law of Patrick McKittrick, it was ordered that Rufus Switzer, special commissioner, do proceed to make the sale directed to be made by him in said first-entitled cause, and report the same to court. On the 20th day of September, 1888, a decree was rendered in said consolidated causes on the report of said Rufus Switzer, special commissioner, reporting the sale of the tract of land decreed to be sold in said causes, setting forth that the same had been sold to one J. M. White for one thousand one hundred and twenty dollars; that the said purchaser had paid cash \$500, and executed his two notes for the balance, with security, *etc.*, which sale was approved and confirmed, and said commissioner was directed out of the money in his hands arising from said sale, to pay first the cost of said sale and consolidated suits, and the judgment rendered in favor of the plaintiff in the cause of Daniel McKittrick *et al*., and directed said special commissioner, when the purchase money was paid, to execute a deed to said purchaser. On the 31st day of May, 1889, a decree was rendered in said causes directing a commissioner of said court to ascertain and report (1) who are the heirs of Patrick McKittrick, deceased; (2) in what proportion they are entitled to the distribution of the moneys arising from the sale of the

tract of land sold in said cause. On the 20th day of January, 1890, said commissioner reported that the evidence filed before him was utterly insufficient to enable him to make the report required by said decree, and at the request of counsel for the defendant, Catherine McKittrick, he reported that the taxes on the land of which Patrick McKittrick died seised and possessed, assessed thereon for the years 1885, 1886, 1887, and 1888, amounting in the aggregate to the sum of one hundred and twenty-eight dollars and thirty-four cents were paid by said Catherine McKittrick, and by a subsequent decree said last-named report was confirmed, and said special commissioner was directed to pay said Catherine McKittrick out of the funds in his hands the said sum of one hundred and twenty-eight dollars and thirty-four cents, with interest thereon from January 20, 1890, which aggregated the sum of one hundred and forty-one dollars and twenty-five cents at the date of said decree. Ellen McDonald excepted to said commissioner's report, so far as it found that Catherine McKittrick paid any of the taxes set out in said report, and so far as it found that the estate of Patrick McKittrick should be charged with said taxes, or any part thereof, or that she should receive payment of the same from said estate; which exceptions were overruled by said decree, and Ellen McDonald and others obtained this appeal.

The first error assigned and relied upon by the appellant is that the circuit court of Putnam county erred in consolidating and naming together the said chancery causes. Now, as we understand the practice in regard to the consolidation of causes it is a matter addressed to the sound discretion of the court that tries the causes. So in the case of *Beach v. Woodyard*, 5. W. Va. 231, this Court held that the rule for the consolidation of suits is alike in equity and at law, and the matter is always addressed to the discretion of the court. The proper mode for bringing the subject to the attention of the court is by motion for a rule to show cause why suits or actions should not be consolidated. Where the parties are the same, and separate suits have been brought in equity upon matters which might have been united in one suit, and the defense is the same in all, a consolidation rule ought to be granted, *etc.* In the case under consideration the object of both of the

suits, or at any rate the main object, was to subject the real estate of Patrick McKittrick to sale to pay off and satisfy his indebtedness. It is true, the first suit prayed for the sale of so much thereof as would pay off the liens existing against the same, and, if the surplus left was susceptible of partition, that the same be partitioned among the heirs at law of said Patrick; but, if not susceptible of partition, that it be sold, and the proceeds divided among said heirs. The suit brought by Daniel McKittrick prayed that all proper accounts be taken, and that the real estate of said Patrick be subjected to sale for the payment of his just debts and liabilities, and especially the debts claimed against said estate by the plaintiff. This plaintiff might with propriety have come into the first suit by petition, and made himself a party, and presented his claims in that suit; and, in my opinion, the court committed no error in requiring the said causes to be consolidated and heard together. The court would properly direct such consolidation to prevent the estate from being consumed in unnecessary costs.

The next assignment of error is that the court erred in the decree of March 3, 1887, in directing the sale of the land in said causes mentioned without setting aside to the widow, Catherine McKittrick, her dower in said land. An examination of the record discloses the fact that not only in the decree of March 3, 1887, but in the decree of March 3, 1888, after said causes were consolidated, said real estate of Patrick McKittrick was directed to be sold without first having assigned to the widow, Catherine McKittrick, her dower therein. This question was before this Court in the case of *Kilbreth v. Root's Adm'r*, 33 W. Va. 600 (11 S. E. 21), where it is held (point two of syllabus) that, "when the widow is a defendant in the suit, and has not elected to take the value of her dower in money, her dower should be assigned before an out and out sale of the realty is decreed." In that suit the main object of the bill was to enforce the lien of a decree against the real estate of Root, who was deceased. See, also, *Laidley v. Kline*, 8 W. Va. 218 (seventh point of syllabus), where the same is held.

The remaining assignments of error are as follows:
“(3) The court erred in confirming the report of J. L. Mid-

dleton made in said consolidated cases. (4) It erred in finding that the estate of Patrick McKittrick was indebted to Catherine McKittrick in the sum of one hundred and forty-one dollars and twenty-five cents, and giving judgment for said amount. (5) It erred in overruling the exceptions made by the petitioners to the report of Commissioner Middleton filed on the 6th day of February, 1890." All of these assignments depend to a great extent upon the evidence which was before the commissioner, which has not been certified to this Court, and does not appear in the record. The cause must, however, be reversed and remanded for the reason that said land was sold without first assigning to Catherine McKittrick her dower therein, she not having in any manner signified her consent to take a gross sum in lieu of her dower therein. Reversed and remanded, with costs to appellees.

Reversed.

CHARLESTON.

SIMPKINS v. WHITE *et al.*

Submitted January 21, 1897—Decided March 17, 1897.

1. UNLAWFUL DETAINER—*Summons—Justice of the Peace.*
Summons in unlawful detainer before a justice, *held good.*
(p. 126.)
2. UNLAWFUL DETAINER—*Description of Premises.*
Description of premises in unlawful detainer, *held good.*
(p. 127.)
3. UNLAWFUL DETAINER—*Summons—Description of Premises.*
Description of premises in summons in unlawful detainer before a justice shall describe the premises with convenient certainty, so as to enable the sheriff to deliver possession; but that description need not be so certain as in itself and alone to enable him to do so, as he may deliver as the plaintiff, or information from other sources, may direct, so he do not violate the description in the summons. If that description can be rendered certain by extrinsic evidence, it is sufficient. (p. 128.)
4. STARE DECISIS.
Doctrine of *stare decisis* discussed. (p. 129.)

43	125
43	520
43	819
43	825
43	125
44	25
45	133
43	125
47	6
47	678
43	125
49	11
49	104
43	125
52	93
43	125
55	322
43	125
58	73
58	73
43	125
59	96
60	262
43	125
61	110
43	125
62	460
43	125
66	386

5. UNLAWFUL DETAINER—*Pleading—Verdict.*

In unlawful detainer before a justice, or on its appeal, a verdict, on full trial on the merits, will not be set aside because there was no plea and issue. The statute puts in the plea of not guilty. (p. 130.)

6. VERDICT WITHOUT ISSUE.

The rule that a verdict without issue is bad, questioned by BRANNON, JUDGE. (p. 129.)

Error to Circuit Court, Logan county.

Action by Joseph Simpkins against H. S. White and Cohn Caudle. Judgment for plaintiffs and defendants bring error.

Affirmed.

H. K. SHUMATE and BROWN, JACKSON & KNIGHT for plaintiffs in error.

CAMPBELL, HOLT AND CAMPBELL, for defendant in error.

BRANNON, JUDGE:

This was an action of unlawful detainer begun before a justice, and appealed to the Circuit Court, ending in a judgment for Simpkins against White and Caudle. One question is whether the summons was good against the motion to quash it. The defect is alleged to be in its omission of the words "unlawfully withholding." Code, 1891, c. 50, s. 212, says that the summons shall require the defendant "to answer the action of the plaintiff for unlawfully withholding from the plaintiff the premises." The present summons requires the defendants "to answer the complaint of Joseph Simpkins in a civil action for the recovery of the possession of real estate situated," *etc.*, and states that "the plaintiff will also claim one hundred dollars damages for the unlawful detention of said property." Even if we did not have the clause in section 26, chapter 50, that "no summons shall be quashed or set aside for any defect therein, if it be sufficient on its face to show what is intended thereby," I should have no halt in saying that this summons notifies the defendants that they are both charged with unlawfully withholding the premises. If not, why does it say that its object is recovery of possession? To recover by action is to obtain what is detained unlawfully,—that is, against the right of the party; to obtain what he has not,

and the other party has; and, when the summons says it is to recover possession, it fairly means to get actual possession from a defendant having it. But this is not all. It says damages will be claimed "for the unlawful detention of said property." Its plain meaning is that both defendants unlawfully withheld possession. No other construction would be anything but very technical. After writing the above, I find the case of *Postlewait v. Wise*, 17 W. Va. 1, holding good a declaration in ejectment omitting the allegation that the defendant unlawfully withholds from the plaintiff the possession of the premises, though, as here, the statute says it shall so aver. It pointedly meets this objection.

Another alleged defect is that the summons does not sufficiently describe the premises in saying that it is "real estate situated in Logan county, and bounded and designated as 10-acre lot lying near Beech creek bridge, bounded by Beech creek and Beech creek switch and land of P. A. Steel, it being the same property upon which the said Caudle now resides." This is relied on in the assignment of error, but is not insisted upon in the brief. It is an untenable objection. It is as certain a description as is practicable, unless every line be given. The sheriff could give possession of it. Here we have general and particular calls. We are directed to the neighborhood, and when there we have signs by which to find the particular land, because we have creek and adjoining land and quantity given, and are told who lives upon the land. It would have been good as an entry of waste land in times gone by. *McNeel v. Herold*, 11 Grat. 314. Less certainty is required in a grant, as Judge Lee there says, than in an entry. A declaration in ejectment or a summons in unlawful detainer need not contain more certainty of description than a deed conveying land. On first thought, we are inclined to say that such declaration must contain a description which will enable the sheriff, from that description alone, without other aid, to deliver possession to the plaintiff; but that is incorrect, as he can get information from the plaintiff or elsewhere to guide him, as Judge Haymond shows in *Board of Ed. v. Crawford*, 14 W. Va. 797. It seems he is to deliver as the plaintiff directs (*Herm. Ex'ns*, § 351; *Freem. Ex'ns*, § 472), unless it would

violate or exceed the plain description contained in the execution, and to follow the plaintiff's direction would be manifestly wrong. He surely may take means to glean information to enable him to apply the language of the writ of possession to the subject-matter, the land. He must not contravene his warrant, however, but he can resort to extraneous aids. The law of description in deeds is that of reasonable certainty only; "but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain. A deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it is intended to convey. The office of a description is not to identify the land, but to furnish means of identification." Jones, Real Prop. § 323; *Thorn v. Phares*, 35 W. Va. 771 (14 S. E. 399). Let us have as much certainty in the declaration as convenient, as it is all the better; but where there is not the highest degree, or even a high degree of certainty, let us not overthrow it by too rigid a requirement, which is not exacted by the law. I think a misunderstanding prevails considerably in this matter. *Carter v. Railway Co.*, 26 W. Va. 644, will sustain this view, and the present summons is more certain than the declaration in that case. In support I refer to the opinion in *Board of Ed. v. Cranford*, 14 W. Va. 790, and Tyler, Ej. 393. That case liberalized on this matter, and since then the above-quoted clause has been put in the statute. See opinion *Postlewait v. Wise*, 17 W. Va. 10.

Another point made against the judgment is that, while White pleaded not guilty, Caudle entered no plea, and the case was tried without issue as to him. It is claimed that under *Ruffner v. Hill*, 21 W. Va. 152, and cases cited there, and later cases of *Bennett v. Jackson*, 34 W. Va. 62 (11 S. E. 734), and *State v. Brookover*, 42 W. Va. 292 (26 S. E. 174), this is reversible error. Under this doctrine, a case fairly tried on the belief, on the part of the court and parties, that a plea had been entered and issue joined thereon, and tried in precisely the same way in which it would have been tried if such issue had been formed, is to be tried over again because the verdict must

be set aside. This is the driest and most hurtful technicality, reversing fair trials, delaying justice, and ruining parties from costs, and almost rendering the administration of justice a mockery. It is based only on the common-law rule that there can be no issue without plea, and unless an issue is made, which the parties alone can do, there can be no trial; but the parties have, in effect, made an issue by going to trial as on an issue. I know it is sustained by numerous cases, and is protected by the rule of *stare decisis*, as expounded in *Clark v. Figgins*, 27 W. Va. 663, and case there cited. I yield to no one in respect for this rule conducive to stability and certainty of principles of law, but where it works so as to be illogical and unreasonable, it ought not to be followed. Where it applies to rights of property, it has stronger claim for observance than in cases of mere practice, as in this case. I would make this difference. 23 Am. & Eng. Enc. Law, 28, 36. The rule has its exceptions. In *Rumsey v. Railroad Co.*, 133 N. Y. 79 (30 N. E. 654), it is said: "It is no doubt true that even a single adjudication of this court, upon a question properly before it, is not to be questioned or disregarded except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question. But the doctrine of *stare decisis*, like almost every other legal rule, is not without exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question. Chancellor Kent, commenting on the rule of *stare decisis*, said that more than one thousand cases could then be pointed out, in the English and American reports, which had been overruled, doubted, or limited. He added that it is probable that the records of many of the courts of this country are replete with hasty, crude decisions, and such cases ought to be examined without fear, and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed, by the perpetuity of error. 1 Kent Comm. (13 Ed.) 477." See *Frank v. Darst*, 14 Ill. 304 to same effect.

See note on *Stare Decisis*, *Ge'e's Adm'r v. Williamson*, 27 Am. Dec. 631.

In this case there could be but one plea, letting in all defenses. That plea would deny the unlawful withholding of the premises. The jury was sworn "to well and truly try the issue whether the defendants unlawfully withhold the premises in controversy from the plaintiff," just as if the plea had been in and an issue raised, and their verdict answered that issue and oath. Full trial was had as on that issue. How is the defendant Caudle injured? Certainly White is not, from Caudle's failure to plead. To so hold is a travesty upon justice, a reproach on legal procedure. And this matter involves merely a rule of practice, not of title to property. It is more serious to disturb decisions on which title to property rests. (Of course, it is to be understood that I am speaking of the rule of *stare decisis*, not *res judicata*, as they are widely different). But I do not think the rule that where there is no plea and issue a verdict, however just, must be set aside, applies to cases before justices or on their appeal. Now, where a case is tried on its merits before a justice, without any pleadings, that, in practice, has not been regarded as an objection to the verdict, though it would be in an action originating in the circuit court; and on appeal, section 169, chapter 50, Code 1891, says the case may be tried on the pleadings before the justice or new pleadings. Great liberality is allowed in such proceedings. Who would think of setting aside a verdict founded upon full, fair trial, because of want of a plea of *nil debit* or *non assumpsit* or *non est factum*, or other common-law plea, general or special? But, moreover, in this particular action of unlawful detainer before a justice, the statute prescribes no plea at all, but does provide that the jury "shall be sworn well and truly to try whether the defendant unlawfully withholds the premises," and prescribes this distinctive oath, and no other; and this, whether the defendants appear or not; and the plea of not guilty of withholding possession would call for no other oath. And section 68 says that when a defendant does not appear the plaintiff must prove his case, and, under section 218, this applies to unlawful detainer. And so it is that the statute law puts in the plea of general traverse or denial of the allegation of un-

lawfully withholding the premises alleged in the summons. What more could the defendant do? This is a statutory, not a common-law, action, requiring no common-law plea, and the statute prescribes none. Judgment affirmed.

Affirmed.

CHARLESTON.

SOUTH BRANCH RY. CO. v. LONG'S ADM'R.

Submitted February 3, 1897—Decided March 17, 1897.

1. WITNESS—*Competency of Witness.*

A witness may be competent to testify concerning some of the facts in issue, though incompetent as to others. (p. 133.)

2. WITNESS—*Competency of Witness—Transactions with Decedent.*

A party to an action, or interested therein, may testify to any fact which is material in evidence, and does not involve a personal transaction or communication with the opposite party, notwithstanding the death or insanity of the latter. (p. 133.)

3. CORPORATIONS—*Stockholders—Evidence—Stock Book.*

Where the name of an individual appears upon the stock book of a corporation as a stockholder, the presumption is that he is the owner of the stock appearing in his name; and such book is proper evidence to go to the jury to show that he was a subscriber to the capital stock of such corporation. *Railroad Co. v. Applegate*, 21 W. Va. 172. (p. 134)

Error to Circuit Court, Hampshire county.

Action by the South Branch Railway Company against Conrad Long's administrator. Judgment for defendant, and plaintiff brings error.

Reversed.

S. L. FLOURNOY, ROBERT WHITE and H. B. GILKESON for plaintiff in error.

R. W. MONROE for defendant in error.

MCWHORTER, JUDGE:

In 1874 the South Branch Railway Company brought its action in *assumpsit* against the defendant, Conrad Long, in the Circuit Court of Hampshire county. Demurrer to the declaration was sustained by the circuit court, and the case brought to this Court on writ of error, on the hearing of which, counts one, two, five and six of the declaration were held sufficient, the judgment was reversed, and cause remanded for new trial. See *Railway Co. v. Long*, 26 W. Va. 692. The defendant Long having died, the action was revived and ordered to proceed in the name of John C. Heiskell, administrator of said decedent; and on the 21st day of September, 1894, the cause was tried before a jury on the plea of *non assumpsit*. The plaintiff introduced its evidence before the jury, as shown by the record, as follows: "The charter and incorporations of plaintiff company, and its amended charter by the legislature of West Virginia, as contained in the printed Acts of the Legislature of 1871 (page 121), and of 1872 (page 129); and the stock book and minute book of said company, with the entry in said stock book on page 19, as follows: 'Conrad Long, to shares stock, 5, 500.00.' The testimony of Robert White, former president of said company, and John C. Heiskell, former treasurer thereof, and both stockholders thereof, that said books are the stock book and minute book, respectively, of said company. And the testimony of H. B. Gilkeson, attorney of plaintiff, that he received said minute book from the secretary of said company, and said stock book either from said secretary or from said Heiskell, who was treasurer of said company; that said company was regularly organized in 1871, and its road built from Green Spring, on the Baltimore & Ohio R. R., to Romney, W. Va.; that calls upon subscribers to the capital stock of said company for payment of eighty *per cent* of their stock were legally and regularly made; that said Conrad Long said to J. W. Poling, the deputy sheriff who served the summons in this suit on him, 'Where are they going to get their money? How are they going to get it? I subscribed to a narrow-guage road, not to a broad-guage road;' that the original subscription list has been lost, and can not be found. 'The subscribers promise and bind themselves to pay into the capital stock of the South

Branch Railway Company the shares of stock, of \$100 each, affixed to their names, as shall be required by the said company after its organization. Names: Robt. White, 5; William Taylor, 3,"—followed by sixty-eight other subscribers to said paper, for different numbers of shares, from one up to ten and including the name of "Conrad Long, 5." Then follow a statement of assets of the company, and a recapitulation thereof. This was all the evidence introduced, none being offered on the part of the defendant. Upon this the jury rendered a verdict for the defendant, which the plaintiff moved the court to set aside, and grant it a new trial on the ground that the verdict was contrary to the law and the evidence, which motion the court overruled, and entered judgment upon said verdict, and plaintiff excepted thereto, and insisted that the court erred in refusing to set aside the verdict, and award it a new trial.

The defendant propounds the following: "Did the plaintiff produce such proof before the jury in support of its claim (that Conrad Long, by a *bona fide* subscription of five shares of stock, bound himself to pay it, the amount due on said five shares, at the time this suit was instituted) that the jury could not fairly, under its oath and its discretionary powers, do otherwise than find for the plaintiff the sum claimed in its declaration?" This proposition, I think, contains all there is in the case. Was the evidence permitted to go to the jury admissible? Section 23 of chapter 130 of the Code provides that "no party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic." "A witness may be competent to testify concerning some of the facts in issue, though incompetent as to others. A party to an action, or interested therein, may testify to any fact which is material in evidence, and does

not involve a personal transaction or communication with the opposing party, notwithstanding the death or insanity of the latter." 29 Am. & Eng. Enc. Law, p. 740, and cases cited; *Hefflebower v. Detrick*, 27 W. Va. 16, 22.

The court refused to permit plaintiff to prove by witness Robert White, former president and stockholder of the company, the subscription of Conrad Long to the capital stock of the company, upon objection by the defendant. The books of the company were admissible as evidence before the jury, proved by witnesses White and Heiskell, former officers of said company, and H. B. Gilkeson. The subscription list seems to have been introduced without objection by the defendant, and no proof of the signature was required in the absence of a denial under oath. "When the name of an individual appears on the stock book of a corporation as a stockholder, the presumption is that he is the owner of the stock appearing in his name; and such a book is proper evidence to go to the jury to show that he was a subscriber to the capital stock of the corporation." *Railroad Co. v. Applegate*, 21 W. Va. 172; *Turnbull v. Payson*, 95 U. S. 421.

The stock book of the company, which of itself is presumptive evidence of the ownership of the stock by the defendant Long, together with the testimony of the witness Poling (to say nothing of the subscription list), in my opinion, constitutes such proof "that the jury could not fairly, under its oath and its discretionary powers, do otherwise than find for the plaintiff"; there being no evidence offered by the defendant in rebuttal. It follows, therefore, that the judgment of the circuit court must be reversed, with costs to the plaintiff in error, the verdict of the jury set aside, a new trial granted the plaintiff, and the cause remanded to the circuit court of Hampshire county, for a new trial to be had therein according to the principles herein settled.

Reversed.

CHARLESTON.

BLANKENSHIP v. KANAWHA & M. Ry. Co.

Submitted January 16, 1897—Decided March 20, 1897.

1. JUSTICE OF THE PEACE—*Process—Appearance—Waiver—Appeal.*

In an action before a justice of the peace, the defendant, not having entered a special appearance before the justice for the purpose only (and so stating in submitting his motion) of quashing the writ or return, cannot, on appeal to the circuit court, take advantage of any defect in the writ or return, either by motion to quash, or by a plea in abatement. *Layne v. Railroad Co.*, 35 W. Va. 438. (p. 139.)

2. JUSTICE OF THE PEACE—*Summons—Guardian ad Litem.*

A summons sued out in the name of J. W. B., guardian *ad litem* of W. B., a minor, before a justice, although not in the best form, yet, aided by the provision in section 26 of chapter 50 of the Code, in relation to proceedings before justices, that no summons shall be quashed or set aside for any defect therein if it be sufficient on its face to show what is intended thereby, is held sufficient, the defendant not being misled by it. (p. 139.)

3. PARENT AND CHILD—*Gifts—Personal Property.*

The object of section 1 of chapter 71 of the Code, is not to prevent a minor from holding such personal property as his father may deem proper to donate to him or allow him to hold, when not in fraud of the rights of others. (p. 140.)

4. PARENT AND CHILD—*Minors Personal Property.*

W., nineteen years of age, employed away from home, took a horse for his wages, and took it home to his father's, with whom he was living; and the father not only never claimed the horse, but recognized the son's right and title to it, and, two months after the son got the horse, the father traded him a mule for the horse; the father testifying that the horse was the property of the son, and that the father was not in debt, and was not sheltering the mule in his son's name, to escape payment of debt. *Held*, that the mule was the property of W., the son. (p. 140.)

5. RAILROADS—*Live Stock—Negligence—Damages.*

On a light, moonlight night, a passenger train of cars was coming at usual rate of speed on a clear, straight track, where a mule upon the track could be seen two hundred and fifty yards or more. A mule goes up a fill to the railroad track far enough in front of the engine to walk along the track in the direction the train was going, some forty feet before

43	135
44	518
45	463
43	135
47	0
43	135
49	148
49	285
49	286
50	00
43	135
57	329

the engine overtook and killed it, the engineer failing to ring the bell or blow the whistle, or to do anything to prevent the accident, if possible. *Held*, to be evidence tending to prove negligence on the part of defendant, and, in the absence of any rebutting evidence, is deemed sufficient to support a verdict for the plaintiff. (p. 143.)

Error to Circuit Court, Kanawha county.

Action by Wilburn Blankenship, by guardian *ad litem*, against the Kanawha & Michigan Railway Company. From a judgment for plaintiff, defendant brings error.

Affirmed.

COUCH, FLOURNOY & PRICE for plaintiff in error.

J. F. CORK for defendant in error.

McWHORTER, JUDGE:

On the 25th day of October, 1893, John W. Blankenship, guardian *ad litem* of Wilburn Blankenship, commenced before a justice a civil action for the recovery of damages for a wrong, against the Kanawha & Michigan Railway Company, claiming one hundred and ten dollars damages, founded upon the following complaint: "The plaintiff, for his right of action against the defendant, says that on the—— day of——, 1893, the said defendant ran its locomotive negligently and carelessly against a certain mule, the property of said Wilburn Blankenship, the infant plaintiff; whereby, and by reason of said negligent and careless act of said defendant, the said mule of said plaintiff was, on the said —— day of ——, 1893, killed, to the damage of the said plaintiff \$110, and therefore he sues." The writ was returnable October 31, 1893, at 10 o'clock A. M., on which last-mentioned day the following appears from the record to be the proceedings had: "Present, the plaintiff, by his counsel; the defendant, by its counsel. No delay being required, the guardian, John Blankenship, consented in writing to serve as guardian for Wilburn Blankenship, and to become responsible for all costs if he fail in the action. The defendant moved to quash the writ, and return thereon, which motion is overruled. The defendant then moved to dismiss the action, for errors apparent in the papers and on the record, which

motion is overruled. The defendant then pleaded not guilty. Witnesses for the plaintiff sworn, the defendant offering no testimony. Judgment was thereupon rendered that the plaintiff do recover the sum of 110 dollars, with interest from the 31st day of October, 1893, until paid, and his costs expended in the prosecution of this suit. Thereupon the defendant appeared, and tendered its bond, signed by George E. Price and George S. Couch, in the penalty of \$220, conditioned according to law, which was deemed sufficient, and appeal allowed." On the 8th of December, 1893, upon the case being called in the circuit court of Kanawha county, "the defendant, by counsel, appeared only for the purpose of moving to quash the process and return therein in this case, and, in support of said motion, offered to prove, and asked to be allowed to prove, that the process served upon the defendant in this case was not signed by the justice, and was therefore a nullity, which motion the court overruled, and refused to hear any evidence upon said motion, to which ruling the defendant objects and excepts, and thereupon the defendant appeared generally, and pleaded not guilty," and a jury was impaneled, and, having heard the plaintiff's evidence in full, the defendant moved the court to exclude said evidence from the jury, which motion, being argued and considered, was overruled, to which defendant excepted. The jury then rendered the following verdict: "We, the jury, find for the plaintiff, and assess his damages at \$110,"—which the defendant moved to set aside, as being contrary to the law and the evidence, which motion was also overruled, and exception taken thereto.

The first assignment is that the court erred in overruling the defendant's motion to quash the writ. The object of the writ is to bring the defendant into court, and his general appearance in the case cures all defects in the process and its execution. The appearance in this case was not a special appearance. While it is true the motion to quash the writ and return was the first motion made, it was not stated by counsel for defendant that he appeared for that purpose only; and upon the motion being overruled, without taking any exception or making objection thereto, he made another motion to dismiss, upon which motion being also overruled, he plead not

guilty, and the case proceeded to trial. In *Spooner v Railroad Co.*, 115 N. Y. 22 (21 N. E. 696), where the same question arises, Justice French, in delivering the opinion of the court, says: "The difficulty was one rather of form than substance, and had its basis in the title of the action alone, which was 'Walter C. Spooner, as Guardian *ad litem* of Ethel A. Spooner, an Infant, under the Age of Fourteen years.' The complaint, however, stated a cause of action in favor of the infant, averring a wrong done to her and suffered by her, and so indicating that she was the real plaintiff, appearing by her guardian *ad litem*. The defendant was not misled. The answer correctly interpreted the meaning of the complaint, in spite of the informality of the title, for the defense was rested upon a denial of the negligence alleged, and an assertion of contributory negligence on the part of the infant. The formal defect of the title was therefore properly disregarded when raised at the close of the plaintiff's case, and the trial court was justified in construing the complaint as setting out a cause of action in the name and behalf of the infant appearing by her guardian." In *Railway Co. v. Styron*, 66 Tex. 421, 425 (1 S. W. 161, 162), the court says: "It is urged that the action should have been brought in the name of Millie Styron, by her next friend, and that it was not sufficient when brought by the next friend for the minor's benefit. The proposition is that Millie Styron, named as plaintiff, might prosecute the action by W. W. Styron, stated in the petition to be her next friend, but that W. W. Styron, professing to act as next friend for Millie Styron, setting out a cause of action inuring to her alone, and asking a judgment for her use and benefit, could not be maintained; that an action by W. W. Styron for Millie Styron could not be sustained, while an action in the name of Millie Styron by W. W. Styron could be. This would seem to us to make the rights of parties to depend upon a mere formality, which can be of no essential importance. * * * The essential facts are that the action must be prosecuted for the use and benefit of the minor, by some proper representative. * * * When it appears with certainty, as it does in this case, that the action is based on the right of the minor, that the relief sought is such as the minor alone would be entitled to on

the facts pleaded, and that this is sought for the use and benefit of the minor, then we are of the opinion that the minor is the real plaintiff, whatsoever may be the formula used. This is in accordance with what we understand to have been the effect of the rulings heretofore made in this state." *Cannon v. Hemphill*, 7 Tex. 199; *Moore's Adm'r v. Minerva*, 17 Tex. 23; *Martin v. Weyman*, 26 Tex. 469; *Railway Co. v. Bradley*, 45 Tex. 175; and *Abrahams v. Vollbaum*, 54 Tex. 227. "Such a rule commends itself to reason, and, as fully as would that insisted upon, secures the right of a minor, without prejudice to a defendant. There is no doubt that cases may be found in which it has been held that the pleadings must show, in so many words, that the action is brought by the minor by next friend. Such rulings, however, seem to us to give effect to form, rather than to substance. Whether the petition be worded in the one formula or the other, the adverse party and the court are equally advised of the cause of action, the right in which the recovery is sought, and of the person to whose benefit the recovery is to inure. In the one case, as in the other, the court has the same power over the person who appears as next friend, and, with equal facility, may protect the interest of the minor by shaping its judgment or decree to that end." It seems to me the Texas court takes the common-sense view of the question, and is strongly supported by the New York court in the case above cited. The summons in the case now under consideration is aided by the following provision in section 26 of chapter 50 of the Code, in relation to proceedings before justices: "No summons shall be quashed or set aside for any defect therein if it be sufficient on its face to show what is intended thereby." In consideration of the decisions of this Court, and of the supreme court of Virginia, I should not go so far as the Texas court has gone in a case originating in a court of record; but in view of the provisions aforesaid, contained in said section 26, I am of opinion that the summons in this case, while not in the most approved form, is nevertheless sufficient on its face to show what is intended thereby, and the defendant is not misled by it. The defendant, not having entered a special appearance before the justice for the purpose only (and so stating on submitting his motion) of quashing the

writ or return, "cannot on appeal to the circuit court take advantage of any defect in the writ or return, either by motion to quash, or by a plea in abatement." *Layne v. Railroad Co.*, 35 W. Va. 438 (14 S. E. 123). The court did not err in overruling the defendant's motion to quash the writ and return.

It is contended that "the court erred in refusing to exclude the plaintiff's evidence from the jury, as the same, if it proved anything, proved that there was no right of action in the plaintiff, but if it existed at all, was in the father of the plaintiff, who was the owner of the mule at the time it was killed. Wages and mule belonged to the father" (Code, c. 71, s. 1); and "(a) the testimony did not tend to show any negligence on the part of the defendant that resulted in the death of the mule." The object of the statute (*Id.*) is not to prevent a minor from holding such personal property as his father may deem proper to donate to him, or allow him to hold, when not in fraud of the rights of others. "When the donee of personal property was under the age of 21 years, and lived with his father, the donor, the possession of the donor of the gift is consistent with the donee's right, and is not even presumptive evidence of fraud." 8 Am. & Eng. Enc. Law, p. 1335, and cases cited. And, "when no fraud is shown, the voluntary relinquishment by the father to the son is good, as against the donor's subsequent creditors." *Randall v. Lang*, 23 Ala. 751. "Where a father permits his child, residing with him, to make sale of personal property, which he has given him while so residing with him, of which he has had possession only at their residence, and to invest said gift, or the proceeds of the sale thereof, in other personal property, in the name and for the use of such child, the property in which such proceeds are invested is the property of the child." *Lourther v. Lourther*, 30 W. Va. 104 (3 S. E. 42). In this case the plaintiff was a young man, nineteen years of age, who was employed away from home, and took a horse for his wages, and took it home to his father's, with whom he was living; and the father not only never claimed the horse, but recognized the plaintiff's right and title to it, and, two months after plaintiff got the horse, the father traded him the mule (that was afterwards killed) for the horse. The father states that the horse was

the property of plaintiff; that he (the father) was not in debt, and was not sheltering the mule in his son's name to escape the payment of debt. The mule, when killed, was the property of the plaintiff, Wilburn Blankenship.

Defendant contends that the testimony did not tend to show any negligence on the part of the defendant that resulted in the death of the mule. Let us look to the testimony touching this point. Wilburn Blankenship says: "The night the mule was killed was a very bright night, and one could plainly see. Could see a mule upon the track a distance of 250 yards. Stepped 250 yards upon a similar night, and saw a man standing on the track. *

* * There was a fill where the mule was killed, eight or ten feet high, and as wide as the ties on top, and about 200 yards long. Cattle guard at lower end of fill. Path led up on fill at upper end of cattle guard. Fill runs out at upper end, and no cattle guard at that point. From said cattle guard towards Charleston road mainly level; up grade, if anything. Mule was killed at night, little before 10 o'clock. Witness was at singing school, and on his way home when he found the mule dead. Heard train blow at cart factory, some half mile below where mule was killed. Schoolhouse was 200 or 300 yards from track. Heard whistle at cart factory, and the next whistle blown was for Elk City, nearly a mile above where mule was killed. Was not positive about bell. Train did not stop that night between cart factory and Elk City. Did not examine for mule tracks. The railroad track, for perhaps a mile above and below where mule was killed, was straight and unobstructed, and there were no bushes or anything to prevent an object on the track from being seen. That the mule killed was the property of the plaintiff." John Blankenship states: That "he is the father of the plaintiff. That the mule was killed by defendant's passenger train a little before 10 o'clock at night on September 21, 1893. That witness was in the bottom, some 200 or 300 yards from the mule, at the time it was killed. Heard train blow at cart factory, some half mile below. Knew mule was out, and witness was listening for whistle. Heard no whistle after train passed cart factory until it blew for Elk City, or the crossing below Elk City, some distance above where the mule was killed.

Went to look after the mule, and found it dead in a ditch by the bottom of the fill. Saw tracks where mule came up on fill just above the cattle guard, and followed track between ends of ties, outside of the rails, about 30 feet from where mule came on fill. Then tracks got between rails, and there were four or five tracks between the rails, covering a distance from 6 to 10 feet. From where last tracks were seen to where mule was lying was a distance of from 30 to 40 feet. From cattle guard above where mule came on fill to where mule was lying dead was 30 steps. Tracks could only be seen between ties, and looked as if made by the mule while walking. Found mule from five to ten minutes after it was struck. Was dead when found. Nothing to have prevented the engineer from seeing the mule for one-half mile. It was killed by the evening passenger train of three coaches. It was a light moonlight night. Bell was rung at first crossing, some 200 or 300 yards above where mule was killed. No bell was rung before, after passing cart factory. Do not know rate of speed. The mule belonged to the plaintiff, the son of the witness. While the mule was traveling on the fill outside of the rail, the train could not have passed by without striking it. There was no path at the outside of the ends of the ties. Mule came up on fill in path at upper end of crossing. Plaintiff is 19 years old, and has always lived with witness. Plaintiff worked for liverymen Jarrett & Riley some two months. They paid him for his services with a horse, which the witness, who is a drayman by occupation, used in his business, and by means of which, in part, gained his livelihood. Witness also owned a horse of his own, which he also used in his said business. Witness traded the horse to me two months after it was acquired for the mule in controversy. Said trade was made with knowledge of plaintiff. Witness worked the mule a short time, as he had before worked the horse, until it was killed by defendant's train. That plaintiff is single, and lived with his father. Witness not in debt, and not sheltering mule in son's name to escape the payment of debt. Witness had not been sued for debt." Witness Spicer Poindexter states: That "he was at schoolhouse, some 50 or 75 yards from the track, at the time the train passed by that killed the mule. Heard train blow at factory some

half mile below. Next whistle blown was for Elk City, or a road crossing some three-fourths mile above where mule was killed. That no bell was rung from time train passed factory until it got above the mule. Track was straight, and there was no obstructions to prevent the object on the track from being seen. Mule was killed by passenger train running at ordinary rate of speed. Track was level, or a little upgrade. Witness was going towards track. Saw mule dead some two or three minutes after train went up. Mule was killed about ten o'clock at night; cannot fix time exactly, but was within 60 minutes from this time. Houses in neighborhood along the line some 200 or 300 yards apart. It was a light moonlight night. People were accustomed to walking the track at that point. There was a path at the bottom of the fill, but there was no path at the end of the ties." "Agreed statement of facts" shows that the "mule was killed by defendant's train, and was worth \$110; that at the point the mule was killed was on a fill, and the track was straight for a mile in the direction from which the train was coming that killed the mule, and that the road of the defendant was not fenced upon the side of the track from which the mule came onto the fill." *Hoge v. Railroad Co.*, 35 W. Va. 562 (14 S. E. 152).

The night was light, with the light of the moon. It is more than likely the engineer saw the mule coming up the side of the fill to the track. It was his duty to have discovered it at least as soon as it reached the track, and started up between the ends of the ties. It was then substantially on the track, as it is shown that the fill was only as wide at the top as the length of the ties, and that the train could not pass without striking it. When it reached the top of the fill, it must have been at least three hundred feet in front of the engine, as it is shown to have walked some forty feet between the ends of the ties and upon the track before its tracks are lost sight of, and where the engine probably struck it. There is no doubt in my mind that it was clearly the duty of the engineer to do what he could by the use of his alarm whistle, and such other means as he may have had at his command to frighten the mule from the track, and, by the proper use of the same in time, he might have prevented it from coming to the track. It is shown by the evidence that he did nothing to

prevent the injury. John Blankenship says: "Knew mule was out, and was listening for whistle. Heard no whistle after the train passed the cart factory (one-half mile below) until it blew for Elk City, or the crossing below Elk City some distance above where mule was killed, and no bell was rung after passing factory until reaching Elk City crossing." Plaintiff says: "Heard whistle at cart factory, and the next whistle blown was for Elk City. Was not positive about bell. Train did not stop that night between cart factory and Elk City. Was not positive about bell. Train did not stop that night between cart factory and Elk City." Spicer Poindexter, witness, says: "Heard train blow at factory some one half mile below. Next whistle blown was for Elk City, or a road crossing some three-fourths mile above where mule was killed. No bell was rung from time train passed factory until it got above the mule."

While the evidence may not make a strong case against the defendant, it shows that the engineer of the defendant company left undone what was clearly his duty to do, not only to prevent, if he might, the injury complained of, but for the security of the passengers and the train in his charge; and, in the absence of any rebutting evidence, it is deemed sufficient to support the verdict. The judgment of the circuit court is affirmed, with costs and damages to the appelle, against the plaintiff in error, according to law.

Affirmed.

CHARLESTON.

STATE v. BLUEFIELD DRUG CO.

Submitted January 25, 1897—Decided March 20, 1897.

1. *INTOXICATING LIQUORS—Sales by Druggists—Prescription of Physician.*

In any prosecution against a druggist for selling alcohol, spirituous liquors, or wine, if the sale be proven, it shall be presumed that the sale was unlawful, in the absence of satisfactory proof to the contrary; but this presumption may be

rebutted by the production of the written prescription of a practicing physician in good standing in his profession, and not of intemperate habits, complying with the requirements of section 6 of chapter 32 of the Code. (p. 147.)

2. INTOXICATING LIQUORS—*Prescription of Physician.*

A case in which the prescription relied on by the defendant to rebut the presumption that such sale was unlawful is considered as complying with the requirement of the statute, and, under the circumstances of the case, constituting a defense to the indictment. (p. 148.)

Error to Circuit Court, Mercer county.

M. E. Browning and G. H. Wade were convicted of a violation of the liquor law, and bring error.

Reversed.

JOHNSON & HALE for plaintiff in error.

T. S RILEY, ATTORNEY GENERAL for the State.

ENGLISH, PRESIDENT:

At the May term, 1894, of the Circuit Court of Mercer county, an indictment was found against M. E. Browning and G. H. Wade, partners in trade, doing business under the firm name and style of the Bluefield Drug Company, charging them with the unlawful sale of spirituous liquors, which indictment was certified to the criminal court of said county for trial. The case was submitted to the court in lieu of a jury, the indictment having charged the plaintiffs in error as follows: That on the 12th day of May, 1894, they did sell, offer, and expose for sale, at retail, spirituous liquors, wine, porter, ale, beer, and drinks of a like nature; they, the said M. E. Browning and G. H. Wade, partners in trade, doing business under the firm name and style of the Bluefield Drug Company, not then and there having a state license therefor, against the peace and dignity of the state. The facts were agreed as follows: "That the defendants, *bona fide* and in good faith, sold to a Mr. Gibson, whose name is given in the following prescription: 'Prescription: Bluefield Drug Co., Bland Street, Bluefield, W. Va., May 9, 1894. Prescriptions accurately compounded day or night. For Mr. Gibson: R. *Spts. Fermenti ojj.* This spirits is absolutely neces-

sary as a medicine for the person named above, and is not to be used as a beverage. No. 10. Dickie, M. D.' Indorsed on back of prescription: 'This was gotten by me on this date. Taylor Gibson,'—the spirits referred to in said prescription, believing that it had the right to do so. That the Mr. Gibson referred to in said prescription is the same Gibson who got said spirits. That at the time and place of said sale the said defendants were regularly and legally licensed druggists, and at the time and place had in their employ, as a salesman, a registered pharmacist, in compliance with chapter 150 of the Code of West Virginia. That the Dickie whose name is signed to said prescription was at the time a practicing physician, in good standing in his profession, and not of intemperate habits. That said sale was made by the defendants under said prescription in Mercer county, W. Va., within one year next preceding the finding of the indictment in this case."

Now, the sole question presented for our consideration is whether, under said statement of facts, the court was warranted in rendering the judgment which it did against the defendant, from which this writ of error was obtained. Did the prescription, which was offered in evidence before the court, constitute a defense to the indictment? Section 6 of chapter 32 of the Code provides that "in any prosecution against a druggist for selling alcohol, spirituous liquors or wine without a license therefor, if the sale be proven it shall be presumed that the sale was unlawful in the absence of satisfactory proof to the contrary," and then proceeds to provide that "spirituous liquors, except for mechanical or scientific purposes, shall not be sold by any druggist, under the provisions of said chapter, except upon the written prescription of a practicing physician in good standing in his profession, and not of intemperate habits, specifying the name of the person and the kind and quantity of liquors to be furnished him, and stating that such liquors so prescribed are absolutely necessary as a medicine for such person, and are not to be used as a beverage; and the production of such prescription by the defendant at the trial of an indictment against him for the sale of the alcohol, spirituous liquors, or wine mentioned therein, shall be sufficient to rebut the presumption arising from the proof of such sale as hereinbefore provided for,

if the jury believe from all the evidence in the case that the sale was made in good faith, under the belief that such prescription and statement were true." Was the prescription which was presented by the defendant sufficient in form to rebut the presumption that the sale was unlawful? It is contended by the Attorney General that the name of the party for whom the spirituous liquors were prescribed was not sufficiently stated, the name "Mr. Gibson" only appearing on the face of the prescription; but then it is one of the agreed facts that the Mr. Gibson who is referred to in said prescription is the same Gibson who got said spirits at the time and place of said sale; and then the prescription is indorsed: "This was gotten by me on this date. [Signed.] Taylor Gibson." Here is an admission on the back of the prescription that Taylor Gibson got the spirits, and it is agreed that the Mr. Gibson referred to in said prescription was the same Gibson who got said spirits. This fixes the identity of the party to whom the prescription was given, and who made the purchase. What is the object of the statute in requiring the name of the person to whom the prescription is given to be specified? Manifestly in order that the sale be made by the druggist to the party to whom the prescription was given, and in order that no other person should obtain spirituous liquors upon that prescription. Here it is agreed that the Gibson named in the prescription got the spirits. Suppose the full name Taylor Gibson had been given in the prescription; there may have been a number of Taylor Gibsons in that neighborhood, and the prescription would have been very little more definite than it was with the name of Mr. Gibson; but when the agreement of facts comes in, and it is shown that Taylor Gibson, who got the spirits, is the Mr. Gibson mentioned in the prescription, the object and intent of the law is complied with; and, as I think, the prescription was sufficient so far as the name of the party for whom the spirits were prescribed is concerned.

It is next contended that the kind and quantity of liquors to be furnished was not sufficiently stated in the prescription. When we refer to the prescription, we find: "Prescription: Bluefield Drug Co., Bland Street, Bluefield, W. Va., May 9, 1894. * * * For Mr. Gibson: R.

Spts. Fermenti qjj. [which, translated, means two pints of spirits *fermenti*]. This spirits is absolutely necessary as a medicine for the person named above, and is not to be used as a beverage. No. 10." Now, what is a prescription? Webster defines it thus: "(Med.) A direction of a remedy or of remedies for a disease, and the manner of using them; a medical recipe; also a prescribed remedy." In the prescription before us two pints of spirits are prescribed for Mr. Gibson as absolutely necessary for him as a medicine, and not to be used as a beverage. Thus, the manner of using it is prescribed, and the amount is prescribed. As we understand it, where a remedy is prescribed by a physician for a patient, and addressed to a druggist, when such prescription is presented to the druggist he at once understands that the drug or medicine is to be furnished to the party presenting the prescription, and he proceeds to fill it. The physician does not draw an order on the druggist requesting him to furnish the article, but he prescribes it for the patient; and this mode of prescribing for the patient is what is contemplated by the statute when it provides that no sale of spirituous liquors or wine shall be made by any druggist, under the provisions of this chapter, except upon the written prescription of a practicing physician, *etc.* In this case, we think, a proper prescription was presented. It is agreed that the druggist sold the spirits in good faith, believing that he had a right to do so. It appears that Taylor Gibson presented the prescription, and got the spirits prescribed; and it is agreed that he is the same Gibson mentioned in the prescription; and it appears that the requirements of the statute have been strictly followed in stating that the spirits were absolutely necessary as a medicine for said Gibson, and not to be used as a beverage; and, if a druggist is allowed to sell at all to a person presenting the prescription of a physician for spirituous liquors to be used as a medicine, the facts shown in the case under consideration are such as should shield the druggist from successful prosecution. And, in my opinion, the judgment rendered by the court was not warranted by the facts agreed. The finding of the court should have been set aside; the judgment should have been set aside, and a new trial awarded; and the judge of the circuit court of Mercer

county erred in refusing the writ of error applied for on the 4th day of August, 1896, to said judgment. The judgment of the criminal court is reversed, the finding set aside, and a new trial awarded the defendants.

Reversed.

CHARLESTON.

WOODS *et al.* v. STEVENSON.

Submitted January 15, 1897—Decided March 20, 1897.

1. HARMLESS ERROR—*Incompetent Testimony—Reversal.*

Where a decree is plainly right, the failure of the circuit court to dispose of exceptions to incompetent testimony is not sufficient to cause the reversal thereof. (p. 151.)

2. COSTS.

Costs should usually be decreed to the party substantially prevailing. (p. 152.)

3. SPECIFIC PERFORMANCE—*Parol Contract—Possession.*

Possession, to entitle a person to specific execution of a parol contract, must be actual, notorious, and exclusive. (p. 152.)

4. STATUTE OF LIMITATIONS—*Trusts—Laches.*

Express trusts, cognizable only in equity, are alone free from limitation created by *laches* or statute. All other trusts, whether legal or equitable, are either subject to the statute of limitations or liable to be barred by *laches*. (p. 152.)

5. RESULTING TRUST—*Specific Performance—Laches.*

Where a period of forty years has been allowed to elapse since an alleged resulting trust was created, and the plaintiffs and those under whom they claim have not had that actual, notorious, and exclusive possession which would entitle them to specific performance, a court of equity will refuse relief as against one who denies such resulting trust, and relies on the bar of *laches*. (p. 152.)

Appeal from Circuit Court, Clay county.

Suit by William N. Woods and others against Madison Stephenson. Decree for defendant, and plaintiffs appeal.

Affirmed.

43	149
46	45
48	149
49	291
50	229

43	149
60	375
60	377
60	378

43	149
62	605
162	606

43	149
65	131
65	686

ANDREWS & ARMSTRONG for appellants.

W. E. R. BYRNE for appellee.

DENT, JUDGE:

William N. Woods *et al.*, heirs at law of Campbell Woods, deceased, on the first Monday of March, 1895, filed their bill in chancery in the Circuit Court of Clay county, against Madison Stephenson, seeking specific performance of a certain alleged contract with regard to a certain tract of one hundred and sixty acres of land, known as the "David McColgin Land," the title of which was in the defendant in part, if not entirely. The bill alleges that this land was purchased in partnership by the said Campbell Woods, deceased, and Madison Stephenson, in the year 1854, and the title therefor taken in the name of the latter, until they could agree upon and fix a division line between them, when the said Stephenson was to make conveyance to Woods of his portion; that each took possession of that portion of the land which adjoined their respective adjacent and contiguous lands; that Woods inclosed a part thereof "with fence, and has had the same in actual and constant possession and under cultivation for about 25 years, with the full knowledge, consent, and approval of the said Stephenson"; "that the said Campbell Woods and the said M. Stephenson were brothers-in-law, and the said contract between them was verbal, but plaintiffs here specifically charge that the said Woods, on his part, executed the said contract. He paid the one-half of the purchase money. The said Stephenson gave him possession of the land, and he put valuable improvements thereon, but plaintiffs charge that, after the death of their father, the said Campbell Woods, the said M. Stephenson, supposing that the evidence of their contract was beyond the reach of these plaintiffs, refused to execute to them a deed for the one-half of said land, and has recently begun to exercise acts of ownership and control over that portion which belongs to and should be conveyed by him to these plaintiffs; and he now denies being under any obligation to execute any deed for the said land, and refuses to do so." No excuse is given why said land was not divided in the lifetime of Campbell Woods, who died in the year 1887. Plaintiffs further

charge that, since the death of Woods, Stephenson has committed waste on the Woods portion of the land to the amount of four hundred dollars, by cutting and removing the timber therefrom. They pray specific performance by a division of the land, and the ascertainment of their damages by reason of waste committed. Stephenson filed his answer, denying all the material allegations of the bill, and further setting up that at one time he agreed to let Woods have a certain portion of the land upon certain terms and conditions, with which Woods failed to comply, and afterwards abandoned any intention of purchasing; that about thirty acres of the same land were covered by Woods' title from other parties, to which respondent had long since abandoned all claim to said Woods, who had complete control and possession thereof, for which, to show his sincerity, he filed a quit-claim deed. Respondent further alleges that the original claim of said Woods to said land, outside of the portion covered by his title papers, if any ever existed, was long since abandoned, and is now barred by laches and lapse of time, and that respondent has had open and notorious possession of all of said land, except as aforesaid, and paid the taxes thereon, for the period of forty years prior to the institution of this suit. Plaintiffs replied generally. Numerous depositions were taken by both parties, which consist to a great extent of mere hearsay testimony. Many exceptions were reserved on both sides during the taking of the depositions, but none of them were brought expressly to the attention of the circuit court. The final decree was in favor of the respondent. Plaintiffs appeal, and rely on three assignments of error: (1) Failure to pass on the exceptions to the testimony; (2) in decreeing costs in favor of defendant; (3) in refusing the relief prayed, and dismissing the bill.

As to the first point, the law has been settled that the admission of incompetent evidence will not defeat a decree which is plainly right. *Ball v. Stewart*, 41 W. Va. 654 (24 S. E. 632).

The second assignment is based on the theory that, because the respondent filed a quit-claim deed as to part of the McColgan land; this must be construed into an admission of the right of the plaintiffs to maintain their suit.

The land, however, covered by the quitclaim deed, was in no wise in dispute, but the plaintiffs already had indefeasible title to the same, and respondent only filed the quitclaim deed out of abundant precaution, to show that he did not even pretend to claim the land. The quitclaim deed neither added to nor took from plaintiff's already undisputed title, and hence the question of costs was properly settled.

On the merits of the case, as to the possession necessary to enable the court to decree specific performance, plaintiffs fail to come within the rule established in the case of *Miller v. Lorentz*, 39 W. Va. 160 (19 S. E. 391), wherein it is held that possession, to justify specific performance, must be actual, notorious, and exclusive. No such possession is shown either in the ancestor or the heirs, plaintiffs in this case. On the contrary, the possession appears to have been at the time of the institution of this suit, and for some time prior thereto, in the respondent, but never actually, exclusively, and notoriously in the plaintiffs or their ancestor. Nor do the proofs establish an express trust, so as to bring it within the rule given in the case of *Gapen v. Gapen*, 41 W. Va. 422 (23 S. E. 579). But the most that the plaintiffs have to rely upon is an alleged resulting trust arising out of the claim that the land was purchased in partnership, and the title temporarily taken in the name of one of the partners, for the benefit of both. There is evidence which tends to establish such to have been the original transaction, but this is rebutted by respondent's evidence, sustained by long lapse of time, to wit: over forty years. "Implied, resulting, and constructive trusts come under the statute." See opinion of JUDGE BRANSON in *Gapen v. Gapen*, cited; also *Thompson v. Iron Co.*, 41 W. Va. 574 (23 S. E. 795). Whatever may have been the original rights of the parties, there has been gross laches in this case, even admitting the pretensions of plaintiffs to be true. So great has this been, that it would be wholly impossible for a court of equity to reach a conclusion that would satisfy conscience, and therefore it cannot do otherwise than leave the parties in the condition that their own neglect has placed them. In the case of *Bill v. Schilling*, 39 W. Va. 108 (19 S. E. 514), this Court held that "a court of equity, which is never active in relief

against stale demands, will always refuse relief where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call into activity this Court but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing." *Trader v. Jarvis*, 23 W. Va. 100; *Whitaker v. Improvement Co.*, 34 W. Va. 229 (12 S. E. 507); *Thompson v. Iron Co.*, 41 W. Va. 574 (23 S. E. 795); *Curlett v. Newman*, 30 W. Va. 182, (3 S. E. 578); *Pusey v. Gardner*, 21 W. Va. 470; *Hale v. Cole*, 31 W. Va. 585 (8 S. E. 516); *Gallagher v. Gallagher*, 31 W. Va. 9 (5 S. E. 297). Equity never executes doubtful contracts, unsustained by a clear preponderance of testimony, after an unexplained lapse of time. If the plaintiffs have lost the land in controversy, it is chargeable to the laches of themselves and their ancestor. For the foregoing reasons, the decree is affirmed.

Affirmed.

CHARLESTON.

HOLT v. TAYLOR *et al.*

Submitted January 29, 1897—Decided March 24, 1897.

1. COMMISSIONER IN CHANCERY—*Report of Commissioner.*

Where questions of fact are submitted to a commissioner in chancery, his findings of such facts should be sustained, unless the court is satisfied from the evidence before the commissioner that such findings are erroneous, though such report is not entitled to as much weight as the verdict of a jury. (p. 160.)

2. COMMISSIONER IN CHANCERY—*Report of Commissioner—Appeal—Review of Report.*

Where a master commissioner is required to state and report an account, and returns his report, to which exceptions are filed on the ground that the findings are not supported by the evidence, which exceptions are overruled, and an appeal is taken to this Court, and the testimony taken before the commissioner, together with the documentary evidence upon which said report was based, are made part of the record, this Court will look into said evidence, and, if satisfied it was insufficient to sustain the findings of the com-

43	153
50	18
43	153
58	329

43	153
64	567
43	153
66	70

missioner, and it appears that other testimony might have been adduced before the commissioner upon the questions submitted, will reverse the decree confirming said report with directions to recommit the account to a commissioner in order that further testimony may be taken, and the findings therein corrected. (p. 160.)

Appeal from Circuit Court, Braxton county.

Bill by H. A. Holt, commissioner, against J. C. Taylor and others. Decreee for defendants, and plaintiff appeals.

Reversed.

W. E. HAYMOND and CAMPBELL, HOLT & CAMPBELL, for appellant.

MORRISON & CORLEY for appellees.

ENGLISH, PRESIDENT:

Homer A. Holt was appointed a special commissioner at the June term, 1869, of the Circuit Court of Braxton county, in the chancery cause of F. C. Boggs *et al.* against David S. John *et al.*, to sell a tract of land containing five hundred and thirty-nine acres situated on Naul's creek, same county. In pursuance of said decree said special commissioner sold said real estate on the 2d day of September, 1869, to one John C. Taylor, for the sum of one thousand seven hundred and fifty dollars, who executed and delivered to him his three bonds bearing date September 2d, 1869, for the sum of five hundred and eighty-three dollars and thirty-three and one-third cents each, bearing interest from date, and due in six, twelve, and eighteen months thereafter, with George Williams, Allen S. Berry, Elias Cunningham, and Francis C. Boggs as his sureties. Said sale was confirmed at the September term, 1869, and said Holt was directed to withdraw and collect the sale bonds as they should respectively fall due. Said Taylor and his sureties having failed to pay said bonds when they fell due, said Special Commissioner Holt filed a bill in equity in the Circuit Court of Braxton county against said Taylor and sureties to enforce a collection of said purchase money, with its interest and costs, and praying that said land might be sold for cash, and the proceeds applied thereto. On the 2d day of September, 1871,

a decree was entered in the said cause directing the commissioner aforesaid to resell the land described in the said proceedings, and it appears from his report he did on the 1st day of June, 1872, sell a part of said land (lot No. 3, containing two hundred and seventy-four acres) to Isaac Fleming for the sum of two thousand and five hundred dollars,—one thousand dollars in cash, the purchaser executing his note with Samuel Armstrong as surety for the balance of the purchase money. Said notes were for five hundred dollars each, dated on the 3d day of June, 1872, and payable respectively, in one, two, and three years after date, with interest from date. After said sale was made, and before it was confirmed, said Special Commissioner Holt was elected judge of the circuit court of Braxton county, and, on account of his connection as a party with this litigation, could not preside as judge in any of its further proceedings, and F. J. Baxter was appointed a special judge to preside therein, and on the same day a decree was entered confirming said sale to Fleming, and substituting Marshall T. Frame as special commissioner in the room and stead of said Holt, and empowering and directing said Frame to withdraw and collect the sale bonds as they respectively fell due, and out of the proceeds thereof to pay first to said Holt, special commissioner, fifty-nine dollars commission, next the cost of suit, then to the plaintiff the money and interest theretofore decreed him, and the residue, if any, to John C. Taylor, the defendant. On the 26th day of August, 1885, on motion of Homer A. Holt, commissioner, a decree was entered in said cause by which the same was referred to W. F. Morrison, one of the commissioners of the court, to ascertain and report what, if anything, was coming to John C. Taylor out of the proceeds of said sale. On the 11th day of March, 1893, W. F. Morrison, commissioner, filed his report, wherein he stated the account of Holt as special commissioner from the date of the sale to Fleming on June 3, 1872, to March 20, 1893, without taking into consideration the fact that Holt was relieved as said special commissioner, and Frame substituted in his place on the 21st day of March, 1874, finding there was a balance due said Taylor, as of March 20, 1893, of four hundred and fifty-five dollars and eighty-four cents. This report was also excepted to by Homer A.

Holt, and on the 4th of September, 1893, the matter was recommitted to Commissioner Morrison with directions to reform his report in certain particulars specified in said decree, requiring him to report any matter deemed pertinent by either party. On the 25th of August, 1894, said commissioner filed another report, restating the account just as if Holt had remained commissioner to the time of taking the same. He also stated an account of M. T. Frame as commissioner. By the first statement he ascertained the balance against Holt, special commissioner, as of August 27, 1894, of three hundred and forty-nine dollars and ninety cents; and by the second he ascertained there was an over-payment on the part of Frame, as commissioner, to J. C. Taylor, as of January 27, 1877, two dollars and three cents. To this last report said Holt also filed his exceptions in writing, and on the 1st day of May, 1895, said exceptions were over-ruled, the report confirmed, and said Holt ordered so pay to John C. Taylor the sum of three hundred and forty-nine dollars and ninety cents, with interest from that date, and the costs of said two reports of Commissioner Morrison. From this decree said Holt applied for and obtained this appeal.

In order to arrive at a correct conclusion upon the question presented in this cause, it is well to consider first the fact that from a decree entered therein on the 21st day of March, 1874, it appears that Homer A. Holt on that day submitted a report of sale in pursuance of a decree rendered on the 2d day of September, 1871, from which it appears that on the 3d day of June, 1872, he sold lot No. 3 to one Isaac Fleming for the sum of two thousand five hundred dollars, one thousand dollars of which was paid in hand, and for the residue—one thousand five hundred dollars—he took three bonds of five hundred dollars each, bearing date June 3, 1872, and due, respectively, in one, two, and three years thereafter, with Samuel Armstrong as surety, which bonds were returned with said report, and said decree of sale was confirmed, and said Holt, as commissioner, was allowed for his services the sum of fifty-nine dollars; that on the same day Marshall T. Frame, who was appointed a commissioner for the purpose, was required to give bond in the penalty of three thousand dollars before the clerk of the court, and authorized to

collect said sale bonds as they fell due, paying first said commission to said Commissioner Holt, and then the costs of the suit, next to pay the plaintiff the sum decreed him, and the residue, if any, to John C. Taylor; and said Commissioner Frame was authorized, upon the payment of the purchase money, to execute a deed of conveyance to the purchaser of the aforesaid land, reserving a lien for the payment of the purchase money. Thus it appears that Commissioner Holt returned the bonds taken for the purchase money with his report to the court, and then Commissioner Frame was substituted, and he alone was authorized to withdraw and collect said bonds, and he executed a bond conditioned to the faithful performance of his duty; so that, so far as appears from the record, said Commissioner Frame was the party authorized to control and collect said bonds, and to him the parties in interest have a right to look for the proceeds of said bonds. The fact that said three bonds for five hundred dollars each, taken by said Commissioner Holt, were returned to the court also appears from the report of sale filed by said commissioner. By the first report made by Commissioner W. F. Morrison, to whom the cause was referred, it was ascertained and found that the balance due John C. Taylor on the 20th of March, 1893, was four hundred and fifty-five dollars and eighty-four cents. This report was excepted to by Homer A. Holt, formerly commissioner, in so far as he was charged with amounts paid by purchaser or purchasers of land after the time of the appointment and substitution of M. T. Frame as special commissioner in the cause, 21st of March, 1874, because it appeared said amounts were and must have been paid to said Frame, special commissioner, and said Holt was not, as commissioner or individually, responsible therefor; and he especially excepted to the item of one thousand dollars and interest thereon, amounting to two hundred and seventy-nine dollars and thirty-three cents, as of January 29, 1877, in the account stated by said W. F. Morrison, because said M. T. Frame, commissioner, was chargeable therewith, and not said Holt. On the 4th day of September, 1893, a decree was rendered recommitting said account to Commissioner Morrison, with instructions to make a statement of the money received and disbursed in said cause by said

Holt, commissioner, and by said Frame, commissioner, respectively; and said commissioner found by his report there was due from said Holt to John C. Taylor three hundred and forty-nine dollars and ninety cents as of August 27, 1894, and that four dollars and seventeen cents was due from John C. Taylor to M. T. Frame. To this report said Homer A. Holt filed an exception, alleging as ground for the same that interest was charged against him, as such commissioner, improperly, by the said W. F. Morrison, and because there was no proof showing the liability of said Holt to said Taylor for any sum, and because there was no evidence to warrant the conclusion by which said commissioner reports M. T. Frame, commissioner, as having settled all funds in his hands, and because said commissioner had not properly stated his account as between Holt, as such commissioner, and M. T. Frame, who was substituted as commissioner in place of said Holt, and, if there was any balance of the fund referred to in said report, to which John C. Taylor was entitled, it was in the hands of the substituted commissioner, who collected the last installments of the purchase money, and because in no event should he be charged with the interest which said Commissioner Morrison charged up in said report, and because it appears therefrom that the said commissioner has charged the said Holt, as commissioner, with the interest, by the rule of partial payments, crediting sums at dates on which said commissioner supposed said Holt to have made application of funds, and charging interest on the balance supposed to be in the hands of said Holt, treating the matter as a debt owed by said Holt as an individual, charging interest to dates of supposed credits according to legal rule of interest applying between debtor and creditor in cases of partial payment. As before stated, this exception was over-ruled by the court, and the report was confirmed, and said Holt was directed to pay to John C. Taylor said sum of three hundred and forty-nine dollars and ninety cents, the balance found due from him, and costs.

Did the court err in overruling said exception, and sustaining the finding of said commissioner? In determining this question we look first at the character of the evidence upon which said report was based, and find that several of

the credits given to said Frame as commissioner were based upon checks and orders and receipts which are in no manner shown by the evidence to have any connection with the payment by said Commissioner Frame to such parties as he was directed to disburse the same by the decree substituting him as commissioner as aforesaid.

No effort appears to have been made by said Commissioner Morrison to bring before him either M. T. Frame, or Homer A. Holt, or John C. Taylor, or to take the depositions of said parties, who it might well be supposed could, by their evidence, have thrown the most light upon the status of accounts between said Commissioners Holt and Frame and John C. Taylor during the long period that said account was pending before him, but said commissioner appears to have arrived at his conclusions by inferences, by letters, and by vouchers, which were not of such character as to authorize him legally to base his conclusions thereon. It is also claimed by counsel for Holt, commissioner, as we think properly, that said Commissioner Morrison erred in charging said Holt as commissioner with the two items of thirty-five dollars and sixty-four cents and forty-eight dollars and forty-eight cents, with their interest, representing two payments of eighteen dollars and twenty-eight cents and twenty-five dollars, with their accrued interest, made by John C. Taylor on a judgment that one White held against him, and subsequently paid a second time by M. T. Frame, special commissioner, out of trust moneys in his hands belonging to Taylor,—a transaction with which said Holt had no connection; and it is impossible to conceive why said Holt should be charged with the amount. Again, it is difficult to perceive upon what theory the commissioner charged said Holt with the first and second installments of the purchase money, amounting to five hundred dollars each, with interest thereon from the date of their execution, when it nowhere appears in the record that said Holt was authorized to receive or collect said deferred installments after the appointment of said M. T. Frame as special commissioner in the room and stead of said Holt, or that he did collect them; but, on the contrary, it appears that Commissioner M. T. Frame was authorized and directed to withdraw the bonds taken for said deferred installments, and collect them.

The rule in regard to the recommitment of the commissioners' reports where they have been confirmed has been laid down by this Court in the case of *McGuire v. Weight*, 18 W. Va. 507 (point 4 of syllabus), where it is held: "Where questions of fact are submitted to a commissioner in chancery, his findings upon such facts should be sustained unless the court is satisfied from the evidence before the commissioner that such findings are erroneous, though such report is not entitled to as much weight as the verdict of a jury." And again in the case of *Reger v. O'Neal*, 33 W. Va. 159 (10 S. E. 375) (point 3 of the syllabus), where it is held that: "Where questions purely of fact are referred to a commissioner, his findings will be given great weight, though not as conclusive as the verdict of a jury, and should be sustained unless plainly not warranted by any reasonable view of the evidence. This rule operates with peculiar force in an appellate court when the findings of a commissioner have been approved by the court below." The law in regard to the recommitment of reports is thus stated in 4 Minor, Inst. pt. 2, p. 1503: "Where exceptions are sustained, it will often be necessary, in order to attain the justice of the case, to remit the cause to the commissioner, either to take further testimony to restate the accounts, or otherwise to bring before the court more perfect materials for its determination. * * * And so, where the exception is sustained on the ground of an allowance of a demand upon insufficient testimony, it is proper practice not to pronounce a final decree, but to recommit the report to the commissioner for further evidence and inquiry." Barton, in his *Chancery Practice* (volume 2, p. 655, § 202), propounds the law as follows: "The failure of the master commissioner fully to report on the subjects referred to him; the vagueness and uncertainty of the report; the allowance of a claim upon insufficient testimony, where there is reason to suppose that more evidence can be adduced; the return of the report before all the evidence is in, a good excuse being given for the delay; and the fact of the commissioner having exceeded his authority,—have all been determined to be good reasons for recommitting reports, even where there are no exceptions, and the same result often follows where exceptions are sustained, although this is not always

the case, for, upon exception or exceptions being sustained, the court may modify the report without sending it back to a commissioner." See, also, the case of *Williams v. Donaghe's Ex'r*, 1 Rand. 300, where it is held that: "Where an exception to a commissioner's report is correctly sustained by the court upon the evidence produced, yet, if there is good reason to believe that other evidence might be produced, to give the case a different result, and that such evidence has been withheld in consequence of the commissioner's having allowed the item, the court of chancery ought not to pronounce a final decree, but to recommit the account for further evidence and inquiry." In the case we are considering, the report of the commissioner was excepted to, exception overruled by the court, and the evidence upon which the commissioner's report was based is before us as a part of the record, and an examination of said evidence leads me to the conclusion that it was entirely insufficient to warrant the findings of the commissioner, and it is apparent from the circumstances of the case shown by the record that other and more satisfactory testimony and documentary evidence might easily be obtained. And for the further reason that much of the documentary evidence, evidently relied upon by the commissioner, does not appear from its face, or by any extraneous testimony, to be any evidence upon the questions submitted to said commissioner, or in any manner connected therewith, the decree confirming said report must be reversed, and the cause remanded, with directions to recommit said report to the commissioner, in order that proper evidence may be brought before him upon the question submitted, and a proper conclusion arrived at, with costs to the appellant.

Reversed.

CHARLESTON.

SCRAGGS v. HILL *et al.*(BRANNON, JUDGE, *concurring.*)

Submitted January 25, 1897—Decided March 24, 1897.

43	163
44	743
45	700
43	162
158	419
158	421

1. STATUTE OF LIMITATIONS—*Fraudulent Conveyance—Evidence.*

A creditor cannot set aside a voluntary conveyance, after five years from the making thereof, without proof of actual fraud participated in by the parties to the transaction. (p. 169).

2. VENDORS LIEN—*Implied Lien.*

A vendor who does not expressly retain a lien for the purchase money in a deed made by him for land has no implied lien therefor on such land, even as against his immediate vendee. (p. 172).

Appeal from Circuit Court, Boone county.

Bill by Samuel Scraggs against A. J. Hill and Nancy Hill, his wife. Decree for plaintiff, and defendants appeal.

Reversed.

Jos. M. BROWN for appellants.

STOLLINGS & LEFTWICH and WATTS & ASHBY, for appellee.

DENT, JUDGE:

Samuel Scraggs filed his bill in chancery against A. J. Hill and Nancy Hill, his wife, in the Circuit Court of Boone county, at June rules, 1894. The bill is as follows: "The Bill of Complaint of Samuel Scraggs against Andrew J. Hill and Nancy Hill, His Wife, Filed in the Circuit Court of Boone County, West Virginia. To the Hon. R. C. McLaugherty, Judge of Said Court: The above named plaintiff complains and says: That on the 25th day of December, 1876, he contracted and sold to one J. H. Gray a certain tract of land situate on Camp creek, in said Boone county, containing 400 acres, for the sum of \$1,200, and that thereafter the said J. H. Gray contracted and sold to Sylvester Chambers and the defendant A. J. Hill the said tract of 400 acres of land, reserving to him-

self the timber on said land,—300 acres thereof to the said Sylvester Chambers, and 100 acres, the residue thereof, to the said A. J. Hill. That on the 10th day of October, 1880, the said J. H. Gray and the plaintiff, Samuel Scraggs, by an agreement between them, agreed that the balance then remaining due from the said J. H. Gray to the plaintiff on the said 400 acres of land, amounting to the sum of \$469.80, should be paid from the proceeds of the sale of the poplar timber reserved by the said J. H. Gray on the 400 acres of land sold to the said Sylvester Chambers and A. J. Hill by the said J. H. Gray as aforesaid, and also the poplar timber on the A. J. Hill tract on Little Coal river, which said poplar timber was contracted and sold by said J. H. Gray to G. J. McNeely; and should the poplar timber on the said 400 acres of land on Camp creek and the poplar timber on the A. J. Hill farm on the river, when taken by the said G. J. McNeely, fail to satisfy the remaining balance due from the said A. J. Hill to the plaintiff, Samuel Scraggs, amounting to the sum of \$469.80, then the said Sylvester Chambers was to pay to the plaintiff \$25 of the said remaining balance, and the said A. J. Hill was to pay to the plaintiff the remainder of the unsettled part of said sum of \$469.80 remaining due upon the said 400 acres of land from the said J. H. Gray to the plaintiff. And this plaintiff, acting under said agreement and understanding, and at the instance of the said J. H. Gray, on the 10th day of October, 1880, conveyed to Sylvester Chambers 300 acres of the 400-acre tract of land on Camp creek. A copy of which deed is herewith filed, marked 'A,' and prayed to be made a part of this bill. That on the 10th day of June, 1881, the said Sylvester Chambers and A. J. Hill, by a contract made and entered into between them and the plaintiff, agreed to stand responsible to the plaintiff for the remaining part due from the said J. H. Gray to the plaintiff on the 400 acres of land sold by the plaintiff to the said J. H. Gray, and by the said J. H. Gray to the said Sylvester Chambers and A. J. Hill, amounting to the sum of \$469.80 on the 10th day of June, 1881; to be deducted therefrom, however, the amount to be thereafter realized from the sale of the poplar timber on the said 400 acres of land, and the poplar timber on the A. J. Hill farm on the river, sold by the

said J. H. Gray to G. J. McNeely. And, should the aforesaid poplar timber on the 400-acre tract and the A. J. Hill farm on Camp creek fail to satisfy the said remaining balance against said land, then the said Sylvester Chambers was to pay the plaintiff \$25 of the said remaining balance, and the said A. J. Hill the remaining balance which was then against said land, which said agreement is in writing, and is herewith filed, marked 'B,' and prayed to be made a part of this bill.

"That upon the execution of the contract aforesaid, and at the instance of the said J. H. Gray, this plaintiff conveyed to the said A. J. Hill, by deed dated the 10th day of June, 1881, 100 acres of land, the remaining balance of the 400-acre tract of land sold by the plaintiff to the said J. H. Gray as aforesaid; reserving, however, to the said J. H. Gray the timber on said tract of land. A copy of which deed is herewith filed, marked 'C,' and prayed to be made a part of this bill. This plaintiff further represents: That to the June rules of the circuit court of Boone county, 1886, he instituted an action against the said defendant A. J. Hill for breach of covenant, in failing to comply with the terms of the said agreement dated June 10, 1881, and that on 16th day of April, 1894, he obtained a judgment against the said A. J. Hill for the sum of \$600, and costs amounting to \$67.58. A copy of which judgment is herewith filed, marked 'D,' and prayed to be made a part of this bill. That on the 8th day of May, 1894, an execution was issued upon said judgment against the said A. J. Hill, and delivered to the sheriff of Boone county, which said execution was returned, 'No property found subject to levy,' and accompanied by a schedule of the personal property of the defendant A. J. Hill. A copy of which said execution, with the return thereon, is herewith filed, marked 'E,' and prayed to be made a part of this bill. That on the 8th day of May, 1894, plaintiff caused the said judgment to be docketed on the judgment-lien docket of Boone county. A copy of which is herewith filed, marked 'F,' and prayed to be made a part of this bill. This plaintiff further alleges that the said A. J. Hill, for the purpose of avoiding the payment of his debts and contriving to defraud his creditors and especially this plaintiff, on the 26th day of August, 1882, conveyed or attempted to convey

his wife, Nancy Hill, by deed of that date, all of the lands conveyed to him by this plaintiff by said deed dated the 10th day of June, 1881,—reserving to himself, however, one acre, and the mineral interest to Ward and Allen,—in consideration of three hundred dollars; but this plaintiff charges that no consideration ever passed from the said Nancy Hill to the said A. J. Hill, and for that reason, and because the same was made from husband to wife, and for the purpose of hindering, delaying, and defrauding the creditors of said A. J. Hill, said deed is voluntary, fraudulent, and void as to the plaintiff's claim. A copy of said deed is herewith filed, marked 'G,' and prayed to be made a part of this bill. The plaintiff further charges that his said claim is due and unpaid; that the said A. J. Hill has no personal property or real estate, other than the tract of land hereinbefore mentioned, out of which he can collect his said claim, and that he is entitled to enforce the collection of the same against the said 100-acre tract of land. He comes and therefore prays that the said deed of conveyance from A. J. Hill to Nancy Hill be set aside and held for naught, as voluntary and fraudulent as to the plaintiff's said claim, and that he may have a decree to sell said tract of land; that his said claim may be paid out of the proceeds of sale of said tract of land. And he asks such other, further, and general relief as to equity and good conscience may seem meet, and as may be proper in the premises. And he will ever pray, etc. Samuel Scraggs, by Counsel, Stollings & Leftwich, Sols."

The defendants appeared and demurred thereto, and the demurrer was sustained. The plaintiff amended his bill in court in words as follows: "The Amended Bill of Complaint of Samuel Scraggs against Andrew J. Hill and Nancy Hill, Filed in the Circuit Court of Boone County, West Virginia. To the Hon. R. C. McLaugherty, Judge of Said Court: The above-named plaintiff further complains and says that he has heretofore exhibited in your said court an original bill of complaint against said defendants, which is made a part of this amended bill, and asked to be read in conjunction herewith, in which said original bill he charges that 'the said A. J. Hill, for the purpose of avoiding the payment of his debts, and contriving to defraud his creditors, and especially this plaintiff, on the

26th day of August, 1882, conveyed or attempted to convey to his wife, Nancy Hill, by deed of that date, all of the lands conveyed to him by the plaintiff by deed dated the 10th day of June, 1881,—reserving to himself, however, one acre, and the mineral interest to Ward and Allen,—in consideration of three hundred dollars; but this plaintiff charges that no consideration ever passed from the said Nancy Hill to the said A. J. Hill, and for that reason, and because the same was made from husband to wife, and for the purpose of hindering, delaying, and defrauding the creditors of the said A. J. Hill, said deed is voluntary, fraudulent, and void as to this plaintiff's claim.'

"This plaintiff further charges that at the time the said deed was made by A. J. Hill to his wife, Nancy Hill (August 26, 1882), the said A. J. Hill was in actual possession of the said tract of land attempted to be conveyed by said deed, occupying the same as a home for himself and wife; that he never delivered possession of the same to his wife under their alleged purchase and sale, but said A. J. Hill remained in actual possession of said land as aforesaid, and has so remained in actual and notorious possession of said land continuously up to this time, and is still in possession of and cultivating the same, and that his possession has not been broken since the delivery thereof to him by this plaintiff, and that his wife, Nancy Hill, has never had possession of said land at any time; that the said defendant A. J. Hill, before and at the time of said gift and conveyance to his wife, was indebted to this plaintiff in the sum of money represented by his judgment against said defendant of the date 16th day of April, 1894, and that said gift and conveyance was made for the especial purpose of hindering, delaying, and defrauding this plaintiff in the collection of his claim against the said A. J. Hill; that the said conveyance from said A. J. Hill to his wife, Nancy Hill, is void because made by a husband to his wife, and for the purpose of defrauding this plaintiff out of the debt justly due him at that time, as hereinbefore stated. The said plaintiff comes and therefore prays that said property may be sold to satisfy his said claim, and further prays as in his original bill he has already prayed, and that said conveyance from A. J. Hill to Nancy Hill, his wife, be declared null and void, and

removed as a cloud upon the title of the said A. J. Hill to said tract of land; that said tract of land be sold as the property of the said A. J. Hill, to satisfy the plaintiff's claim. And said plaintiff asks for such other, further, and general relief as the equity of his cause may require, and the court may see fit to grant. And he will ever pray, etc. Samuel Scraggs, by Counsel."

The defendants demurred to the bill as amended, and filed their joint answer as follows; "The Joint Answer of Andrew J. Hill and Nancy Hill, Defendants, to the Bill and Amended Bill of Complaint of Samuel Scraggs, Plaintiff, Filed in the Circuit Court of Boone County, West Virginia, against These Defendants. To the Honorable R. C. McLaugherty, Judge of the Circuit Court Aforesaid: The above-named defendants, saving and reserving to themselves the benefit of the many errors, discrepancies, deficiencies, *etc.*, in the plaintiff's bill and amended bill, by demurrer or otherwise, for answer thereto, or so much thereof as they are advised it is material for them to answer, answering, say that it is true that the defendant Andrew J. Hill did on the 25th day of August, 1882 (not on the 26th, as charged in the plaintiff's bill), convey to the defendant Nancy Hill, his wife, and on the same day acknowledged the same, and delivered to the defendant Nancy Hill the said deed, together with the possession of the 100 acres of land and premises therein conveyed, which has been used and controlled by the said Nancy at all times since to the present, and which deed was in fact made without any money consideration, but wholly for the love and affection of the said Andrew J. Hill to the defendant Nancy Hill, and with no intent whatever to hinder, delay, or defraud the plaintiff or any one else whatever; and these defendants most positively deny the charge in the plaintiff's bill alleging fraud in any manner in said conveyance, and demand strict proof thereof to sustain any such charges. And these defendants further say that the execution, acknowledgment, and delivery of the said conveyance from the said Andrew J. Hill to the said Nancy Hill was more than eleven years prior to the institution of this suit, as well as the possession and control of the 100-acre tract of land aforesaid, subject to the reservations therein set forth to Ward and Allen, *etc.*

"These defendants further answer and say that the purchase of the land conveyed to the defendant A. J. Hill by the Scraggses, of date 10th June, 1881, was made by the defendant A. J. Hill from James H. Gray in March, 1877, by virtue of the contract of agreement first made between the plaintiff, Scraggs, and James H. Gray, dated 15th September, 1876, and which is the only contract this defendant ever had any knowledge of between said Scraggs and Gray; and these respondents deny any subsequent contract by said Scraggs and Gray in relation to the said land in controversy, and fully paid for in the exchange of the land known as the 'A. J. Hill Farm on the River' in the plaintiff's bill, and that the said Gray and plaintiff derived the full benefit of their said river farm in a subsequent trade with Sylvester Chambers, the purchase of the 300-acre residue, and accepted as full and valid consideration for the 100-acre tract sold to defendant A. J. Hill, and by fraud and connivance by and between the said Sylvester Chambers and plaintiff, Scraggs, the said Chambers obtained his conveyance fresh from the plaintiff, Scraggs, and nearly one year thereafter undertook to withhold from the defendant A. J. Hill his legal title and connived together, the plaintiff, Scraggs, and said Sylvester Chambers, and made false representations about subsequent contracts which were, as plaintiff represents in his bill, in existence; and respondents demand proof of the existence of any such subsequent contract in relation to timber on the 400-acre tract. And these defendants most positively deny that the defendant Andrew J. Hill was either insolvent, or indebted to the plaintiff or any one else, at the time of the execution of the deed of 25th of August, 1882, from the defendant Andrew J. Hill to the defendant Nancy Hill, and, having fully answered, pray hence to be discharged with their costs. Andrew J. Hill, Nancy Hill, by Counsel. Barrett, Atty."

The defendants further filed an amended answer pleading the statute of limitations. This, however, was unnecessary, as this Court has determined that the statute of limitations can be taken advantage of by demurrer. *Thompson v. Iron Co.*, 41 W. Va. 574, (23 S. E. 795). No depositions were taken in the case, but it was submitted on bill and exhibits, demurrer, answers, and general

replication, and a decree was entered for plaintiff in accordance with his prayer. The defendants appeal, and insist that the decree is erroneous, and not justified by the pleadings.

It is admitted that the conveyance from Andrew J. Hill to his wife made the 25th day of August, 1882, was voluntary, and, if it had been attacked within the five-year limit fixed by the statute, might have been held void as to the plaintiff's debt, if shown to be an existing obligation at the time of the conveyance. The question, therefore, of the legal presumption of fraud on account of the voluntary character of the conveyance and the preexistence of the debt, is by the statute entirely eliminated from the case, leaving the only point for consideration the alleged actual fraudulent intent of the grantor, participated in by the grantee. The burden of establishing such fraud is on the plaintiff, though it may be inferred from the facts and circumstances, if sufficient to justify such inference. *Reynolds' Adm'rs v. Garthrop's Heirs*, 37 W. Va. 3, (16 S. E. 364).

The facts and circumstances, as gathered from the pleadings and exhibits, are as follows: On the 25th day of August, 1882, Andrew J. Hill conveyed the land in controversy to his wife, Nancy Hill, for the nominal consideration of three hundred dollars; the real consideration being merely love and affection, and the conveyance purely a gift. It was duly admitted to record on the 26th of August, 1882, from which time the plaintiff had notice thereof. And the parties have since been in possession of such property, as the property of the wife. At and prior to the time of the execution of this conveyance there was in existence between the plaintiff and defendant A. J. Hill and one Sylvester Chambers the following unsettled contract: "Article of agreement made and entered into this the tenth day of June, 1881, between Samuel Scraggs, of the first part, and Sylvester Chambers and A. J. Hill, of the second part, all of the county of Boone and State of West Virginia, witnesseth: That the said second party agrees to stand responsible to the party of the first part for the remaining part which is against the land for non-payment, which now under a certain contract between J. H. Gray and McNeely, on the Scraggs land, on Camp

creek, all the poplar timber, also the poplar timber on A. J. Hill farm on the river, it ——— now agreed that the ——— on both places is to satisfy the remaining payments now against it, is in contract for the ———, and if it should fail to satisfy ———, the said Chambers is to pay twenty-five dollars, and A. J. Hill the remainder of the unsettled part, which is now against the land up to this date, June 10th, 1881. Witness our hands and seals. Sylvester Chambers. [Seal.] A. J. Hill. [Seal.] A. J. Dolin."

On this contract plaintiff brought an action of covenant in June, 1886, almost four years after the alleged fraudulent transaction and his constructive notice thereof, and after a legal controversy extending until the 16th day of April, 1894, obtained a judgment thereon for six hundred dollars. Now, from these facts alone, which are hardly sufficient to justify the setting aside of a voluntary conveyance in a suit brought in time, after the lapse of eleven years the court is asked to infer fraud. The only evidence of any existing debt whatever is the uncertain writing above set forth. The writing, on its face, shows only a problematical and conditional future indebtedness, contingent on the failure of another source of liquidation.

The fact that a judgment was obtained on such writing almost thirteen years thereafter for six hundred dollars can not be taken as proof of the existence of an indebtedness eleven years before, as against a grantee in no wise connected with or bound by the suit. For such judgment might be obtained by connivance, by failure to defend, by loss or suppression of testimony, or by other adventitious circumstances arising during the intervening period from the inception of the alleged indebtedness to the date of the judgment. And it has been well settled that a grantee in a deed can not be affected by the admission or conduct of the grantor after the conveyance. See, also, *Trapnell v. Conklyn*, 37 W. Va. 242, (16 S. E. 570). Other than the judgment, what sufficient proof is there that the grantor was indebted to any extent, or to any person, at the time of the conveyance? Without such proof, even a voluntary conveyance would not be set aside within five years after the making thereof, in the face of the denial of the existence of any indebtedness. *McCue v. McCue*,

41 W. Va. 151, (23 S. E. 689). But, in addition to this, there is no allegation or proof that the grantor was insolvent or embarrassed at the time of the conveyance. The insolvency, to affect the *bona fides* of the conveyance, must be coexistent therewith, and not eleven years afterwards, —a period sufficiently long to permit the dissipation of a considerable fortune. A husband not indebted at the time has the right to make a gift of property to his wife. *Rose v. Brown*, 11 W. Va. 122; *Humphrey v. Spencer*, 36 W. Va. 11, (14 S. E. 410). Nor is there any pretense that the grantee participated in the alleged fraud, but this is a clear case in which the creditor, having lost his right to attack a voluntary conveyance, attempts to excuse his negligence by asserting actual fraud, and thus escape the bar of the statute; his position apparently being that because he was lulled into the belief that the conveyance was fraudulent by reason of three hundred dollars nominal consideration mentioned therein, he should be relieved from the effect of his laches. Whether the conveyance was fraudulent in fact or law, or both, he was given the right to bring his suit forthwith; and the mere fact that he believed the conveyance fraudulent does not excuse him from the bar of the statute, but should require of him much stronger proof of actual fraud than otherwise. Is it not probable that the true reason for his delay is to be found in a lack of faith on his part in the integrity of his demand, and that he waited until it could be reduced to a legal form before attacking the conveyance, and thus escape the necessity of establishing it to the satisfaction of a court of equity, as against an innocent third part? This case is fully covered by *McCue v. McCue* above cited. And, as said in that case, it would be the better to have the statute extended to all cases of fraud, rather than to have it frittered away by a too narrow and nugatory construction. At least, creditors seeking to avoid the bar of the statute by pleading actual fraud should be required to render some good reason for not having instituted suit within five years after the right to bring the same accrued. The most that this Court can do, however, is to require satisfactory proof of fraudulent intent, participated in by the parties thereto, and not grant a decree in cases of grave doubt on mere suspicious inference.

The plaintiff further insists that, the debt being for the purchase money unpaid, he has an implied lien, as against his immediate grantor or his voluntary vendee. He refers to some very venerable authority in support of this pretension. Such was the former doctrine as to all sales, but it has been entirely abrogated by section 1, chapter 75, of the Code, where a conveyance of land is made by deed without reservation of lien. *Poe v. Parton*, 26 W. Va. 610. The pleadings and proofs in this case did not justify the decree of the circuit court. It will therefore be reversed and the bill dismissed.

BRANNON, JUDGE: (*concurring*).

It seems to me that the demand of plaintiff constitutes him a creditor, under the chapter on "Fraudulent Conveyances." Section 9 chapter 74, Code 1891, says any one is a creditor under that chapter who, but for the instrument, could subject the land to a debt. A contingent liability is enough. *Hutchison v. Kelly*, 1 Rob. (Va.) 136; *Wolf v. McGugin*, 37 W. Va. 564 (16 S. E. 797); *Bump, Fraud. Conv.* 503. Demand on tort is enough. *Greer v. Wright*, 6 Grat. 154. The judgment was conclusive on Mrs. Hill as to existence, validity, and amount of debt. *Bensimer v. Fell*, 35 W. Va. 15 (12 S. E. 1078), point 5. But I do not think the charge of fraud is established in full.

Reversed.

CHARLESTON.

SMITH v. O'KEEFE *et al.*

Submitted January 21, 1897—Decided March 24, 1897.

1. EQUITY JURISDICTION—*Quieting Title—Possession.*

Where a party having the legal title to a tract of land is in possession of the same, he will be entertained in a court of equity in a suit instituted to remove a cloud from his title. (p. 179.)

2. EQUITY JURISDICTION—*Quieting Title—Possession.*

Where a portion of such tract of land is included by mistake in a survey made under the direction of the commis-

43	172
48	194

43	172
54	619

43	172
59	109
60	988

43	172
61	83

43	172
62	560

43	172
65	65
65	123

43	172
66	307

sioner of school lands, and is sold under the statute for the benefit of the school fund, and a deed made to the purchaser thereof, equity will take jurisdiction of a suit brought by the owner of such tract of land, who is in possession of the same, for the purpose of canceling said deed and removing the same as a cloud upon his title. (p. 179.)

Appeal from Circuit Court, Logan county.

Bill by Jacob Smith against James O'Keefe and another. Decree for defendants, and plaintiff appeals.

Reversed.

CAMPBELL & HOLT, for appellant.

ENGLISH, PRESIDENT:

This was a suit in equity brought in the Circuit Court of Logan county, W. Va., by Jacob Smith against James O'Keefe and Samuel Walton. The plaintiff in his bill alleges: On the 22nd day of June in the year 1877, one George Hatfield was seised and possessed in fee of a certain tract of land situated in said county of Logan, on Mates creek, containing five hundred acres, more or less, and on that day said George Hatfield, together with C. Varney and Mary, his wife, and Larkin Varney and Nancy A., his wife, who held some equitable interest in a portion of said five hundred acres, conveyed the same to the plaintiff by their deed of that date, which was duly recorded in the clerk's office of the county court of said county on the 26th day of June, 1877, the consideration for said conveyance being eight hundred and sixty-five dollars in cash. That on the delivery of said deed the plaintiff took actual, visible possession of said land under and by virtue of said deed, and has ever since continued in the actual, visible, and adverse possession of the land as his own, and paid taxes thereon. That one portion of said land had been granted to the said George Hatfield by the commonwealth of Virginia by letters patent bearing date on the 2nd day of September, 1861, and another portion was granted Hatfield by a like patent dated on the same day and year, each grant containing three hundred and thirty-three acres (which patents were exhibited with the bill). Another portion of said land was granted by the commonwealth of Virginia to Herendon Murphy by letters

patent dated the 30th day of June, 1847, the original of which patent was also filed with the plaintiff's bill. That said Murphy conveyed the last named twenty-two acres to said George Hatfield, which deed was recorded in the clerk's office of Logan county court in a deed book, which during the late Civil War was almost totally destroyed, and the record of said last named deed is entirely gone. That some time in the year 1888 or 1889 one E. H. Simpkins, claiming to have authority from A. W. Buskirk surveyor of lands in Logan county, entered upon a portion of said land, and made a survey purporting to be for the state of West Virginia, and described it as one hundred and fifty acres of school land. A portion of it interlocks with plaintiff's land.

The bill further alleges that L. D. Chambers, commissioner of school lands of said county of Logan, instituted some sort of proceedings against said tract of one hundred and fifty acres in the circuit court of said county, and asked the same to be sold for the benefit of the school fund; and on the 20th day of October, 1888, said Chambers, as such commissioner, made a deed to one William Stratton, purporting to convey said one hundred and fifty acres to him, which deed was duly recorded in the clerk's office aforesaid, and is signed and sealed by said Chambers as an individual, and not in his official capacity as school commissioner (a copy of which deed was exhibited); that on the 6th day of March, 1889, William Stratton and wife made a deed to James O'Keefe purporting to convey to him the said one hundred and fifty acres (which deed was duly recorded, and a copy thereof exhibited), and the said O'Keefe and wife on the 5th day of March, 1889, made a deed to Samuel Walton purporting to convey to him, *inter alia*, a three-fourths undivided interest in said tract of one hundred and fifty acres. And said bill further alleges: That neither at the time of said survey by Simpkins, nor at any time before or since, was any part of the land in the boundaries of the Hatfield deed liable to be sold for the benefit of the school fund, either as waste and unappropriated lands, or delinquent and forfeited lands; to which proceedings on the part of the school commissioners seeking the sale of the said land, plaintiff was not a party, and of which he had no notice, and they therefore are null

and void. And the paper writing purporting to be a deed, and purporting to convey said one hundred and fifty acres to William Stratton, was absolutely null and void, as well as the deed of William Stratton to James O'Keefe and Samuel Walton. That said deeds are a cloud upon the plaintiff's title, and, being in possession of said land, he is not in a position to prosecute an action of ejectment or other suit at law, and that his remedy therefore can be obtained in a court of equity; and he prays that said deeds may be declared null and void so far as they purport to convey any portion of the plaintiff's land aforesaid, and that they be removed as clouds upon his title. The defendants, James O'Keefe and Samuel Walton, demurred to the plaintiff's bill, and the plaintiff joined therein, upon consideration whereof the same was overruled; and thereupon the said James O'Keefe and Samuel Walton tendered their joint answer to the plaintiff's bill, which was ordered to be filed, and the plaintiff replied generally thereto. Said defendants in their answer put in issue the material allegations of the plaintiff's bill. Depositions were taken and filed in the cause by the plaintiff, and on the 4th day of May, 1895, the cause was finally heard, and the bill was dismissed at the costs of the plaintiff, without prejudice to any suit that the plaintiff might thereafter be advised to bring; and from this decree the plaintiff applied for and obtained this appeal.

It is assigned as error that the court below erred in dismissing the plaintiff's bill, because the plaintiff had shown himself clearly entitled to the relief sought, being seised of the land by an indefeasible title, and being in the actual possession thereof; and the defendants' claim being invalid and void, but constituting a cloud, the plaintiff was entitled to have the same removed. The question presented for our consideration in this record is whether a person claiming the legal title to land, being in possession thereof, can maintain a suit in equity to remove a cloud from his title. This question is not a new one in this state, but has been considered by this Court in several cases. In the case of *Clayton v. Barr*, 34 W. Va. 290, (12 S. E. 704), this Court held that "where the estate or title between conflicting claimants to land is legal in nature, and legal remedy is adequate, and one party has already recovered

in ejectment upon his claim, that party cannot sue in equity to remove the cloud from his title arising from such adverse claim; the party suing being out of possession, and the adverse claimant in possession." The case we are considering differs from that in several respects: First, the plaintiff is in possession of the land; second, the defendants are not in possession; third, no action of ejectment has been brought, or could be brought, by the plaintiff, who is in possession. In that case, BRAXXON, JUDGE, cites Pom. Eq. Jur. §§ 1398, 1399, where the law is thus stated: "The jurisdiction of the courts of equity to remove clouds from title is well settled, the relief being granted on the principle, *quia timet*; that is, that the deed or other instrument constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title. Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate where the estate or interest is legal; a party being left to his legal remedy where his estate or interest is legal in its nature, and full and complete justice can thereby be done." In the case of *Simpson v. Edmiston*, 23 W. Va. 675, a suit in equity was sustained in which the plaintiff sought to set aside a tax deed, as a cloud upon his title, although the plaintiff was in possession. So, also, in the case of *De Camp v. Carnahan*, 26 W. Va. 839, this Court held that a court of equity has a right to cancel a deed which is a cloud upon the title of one out of possession.

In that case, JOHNSON, PRESIDENT, delivering the opinion of the Court, said: "It seems to me that in a case like the one at bar the remedy is not so full, adequate, and complete at law as in equity. The parties will be obliged to rest, if the court holds that the deed sought to be removed as a cloud on the title is invalid and cancels it; and if the court refuses to cancel, because the deed is good and valid, they must also rest, for in either case the question is settled. That is a question which a jury cannot be permitted to pass upon in ejectment. But the question of jurisdiction is at rest in West Virginia. We have repeatedly taken jurisdiction of such cases,"—citing *Grinnan v. Edwards*, 21 W. Va. 347; *Haymond v. Camden*, 22 W. Va.

180; *Sturm v. Fleming*, *Id.* 404. This question was also before the court of Appeals of Virginia in the case of *Carroll v. Brown*, 28 Grat. 791, where it was held that "a court of equity has jurisdiction in a suit brought by the owner in possession to set aside a deed which has been put upon record, whereby the complainant's land has been wrongfully conveyed to a purchaser at a tax sale." The facts in this case are very similar to the one under consideration. True, this Virginia case was a tax sale, and the one we are considering was a sale by the commissioner of school lands; but in both cases one hundred and fifty acres were surveyed, by mistake, off of the plaintiff's land, and a deed was made to the purchaser. Burks, J., in delivering the opinion of the court, says: "It is not to be doubted that this is a serious injury to the complainant's rights, and a grievance that calls for redress. What redress is he entitled to, and how and where is he to get it? His remedy, says the circuit judge in his decree, 'is at law, not in a court of equity.' What remedy has he at law? He is in possession of the property, and cannot bring ejectment against the claimant to try the title, and the claimant is content to stand off for the present and not bring an action against him. * * * The mischief springs from the defendant's recorded deed. As long as that stands, the injury must continue. It is a cloud that overshadows the complainant's title, and materially impairs, if it does not wholly destroy, its market value. If the defendant will not release, a cancellation of the deed by judicial authority furnishes the only adequate relief. A court of law can not give this relief, but a court of equity can and should give it." In the case of *Houston v. Shearer*, 99 Mass. 209, it was held that "a person in possession of land, and taking the rents and profits, may, notwithstanding the General Statutes (chapter 134, §§ 49, 50), maintain a bill in equity to quiet his title against one who, as to him, is dispossessed and disseised, but asserts an adverse title under a mortgage the validity of which is denied by the plaintiff." Now, the evidence in the case we are considering clearly shows that the plaintiff had title from the commonwealth, regularly transmitted to him, and that he was in uninterrupted possession of the land, except that some one had built a house on the upper

end of the land (it does not, however, appear that it was a dwelling house, or that it was occupied by any one); that plaintiff's possession has continued since the date of his deed, June 22, 1877, and that he has paid taxes thereon since that time, and that there is an interlock of one hundred and fifty acres between the plaintiff's land and the land surveyed by E. H. Simpkins and sold by L. D. Chambers, commissioner of school lands of Logan county, to William Stratton, and by said William Stratton to James O'Keefe, part of which was subsequently conveyed by James O'Keefe and wife to defendant Samuel Walton; and that plaintiff has paid the taxes on said land since it was conveyed to him in 1877.

Reverting to the question of jurisdiction, we find that Judge Story says in his Equity Jurisprudence (volume 2, § 694), speaking of "Delivery Up, Cancellation, or Rescission of Agreements, Securities, Deeds, or Other Instruments. It is obvious that the jurisdiction exercised in cases of this sort is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, '*quia timet*'; that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him when the evidence to impeach them may be lost, or that they may throw a cloud or suspicion over his title or interest." Again the same author says (section 700): "But, whatever may have been the doubts or difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest, and the jurisdiction is now maintained in the fullest extent. And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose.
* * * If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title." And in the note it is said: "To remove a cloud upon plaintiff's title to land, the plaintiff must, under the common statutes, when suing upon a legal title,

show that he is in possession, or that the land is vacant; for it is said, if the defendant or another is in possession, the plaintiff has a remedy at law, by ejectment or by writ of entry,"—citing numerous authorities.

Cooley, in his valuable work on Taxation (page 544), under the head of "Quieting Title After a Sale," states the law upon this question as follows: "If land has been actually sold and conveyed for a tax, the original owner remaining in possession may have the validity of the sale tested by a bill in equity filed for the purpose of quieting his title. This is the general rule. Courts of law cannot give him relief in such a case, as he cannot bring ejectment, being himself in possession, and no other form of action is given by the common law for such a case." And again this Court, in the case of *Moore v. McNutt*, 41 W. Va. 695 (24 S. E. 682), held that equity will exercise jurisdiction to remove a cloud resting upon title to real estate where complainant, though having legal title, is in actual possession. It will not exercise such jurisdiction where complainant has legal, and is not in actual possession, no matter whether his adversary is in or out of actual possession.

The law upon this question seems to be so well and definitely settled that my conclusion is that the court erred in dismissing the plaintiff's bill. Applying the law as above quoted to the facts established by the testimony, the decree complained of must be reversed; and, this Court proceeding to enter such decree as should have been rendered by the court below, the deeds of the defendants are canceled and removed as a cloud upon plaintiff's title, with costs to plaintiff.

Reversed.

CHARLESTON.

STATE v. BOWYER.

Submitted January 19, 1897—Decided March 24, 1897.

CRIMINAL LAW—*Appeal—New Trial—Verdict.*

Case in which new trial denied. Force of verdict discussed. (p. 182.)

Error to Circuit Court, Mason county.

Bowyer was convicted of burglary and brings error.

Affirmed.

C. E. HOGG and J. B. MENAGER for plaintiff in error.

T. S. RILEY, ATTORNEY GENERAL, for the state.

BRANNON, JUDGE:

Nibert, Dewitt, and Bowyer were sentenced to the penitentiary for burglary, and Bowyer took this writ of error. The sole question presented to us is whether the court ought to have set aside the verdict, as not warranted by the evidence. Three men broke and entered the dwelling house of James Dewitt, a little after dark, and, forcing him to show where he had his money, took from his trunk two hundred dollars. James Dewitt and his sister, the only persons at the house, identified Nibert and Dewitt, but did not recognize the third man. They say he was to them a stranger. Bowyer was from Ohio recently before, while Nibert and Dewitt lived in the neighborhood. Bowyer was at Nibert's house all that night. All three were there together. That is unquestioned. A very short time before the act, Bowyer stated to one Gardiner that he had spent what money he had, and wanted to borrow two dollars and pawn his coat for it. A witness stated that, a couple of days afterwards, Bowyer showed her a twenty-dollar gold piece, two two-dollar bills, and a ten-dollar bill. A twenty-dollar gold piece was among the money taken from Dewitt by the burglars. Bowyer admits showing the gold piece, but equivocates as to the other money. When asked if he showed the money, instead of

43	180
46	506
43	180
49	725

43	180
52	304
43	180
e 59	34

43	180
164	370
64	499

answering, he says, "I was with Al Nibert and Wils Dewitt all the time during the night of the robbery. We were together all night, at Al Nibert's. I don't recollect that I had but a twenty-dollar piece." He did not live with Nibert. A short time after the burglary, Bowyer borrowed a gun, and deposited ten dollars as security for its return. Where did he get this money? He said he had been working in Ohio, but for whom he does not say. He says he had some of Mrs. Dewitt's money, but she is not produced. His brother says he worked in Ohio before coming to this state, but does not say for whom, or how he knew he had money. On the Sunday of the offense, as a witness stated, Bowyer had a long beard, and went to Gallipolis on Monday, and on Tuesday this witness says he was clean shaven. Bowyer was asked by his counsel if he had a beard on at the time of the offense, and he answered equivocally, "I was clean shaved, I think," and, being asked when he shaved, said, "It might have been a week or so; I don't remember just exactly." Being asked if he had a beard an inch long on the next day after the robbery, he said, "No, sir, not that long; I am satisfied it was not that long." He denied being shaven on Tuesday, saying he shaved the last of the week, thus denying the statement of his relative, Lillie Leach, who stayed at the same house with him. A hat was dropped by Nibert on the occasion of the robbery in the yard. Bowyer offered a witness a quarter to go to the house of James Dewitt, and get it; told him just to go right in, and get it, and come right out.

This evidence was before the jury, tending to connect him with the act. By no means can it be said that the case was without some evidence to inculcate Bowyer. It is not worth while to cite authority for the proposition that, where there is evidence tending to criminate, the jury is almost uncontrollably the judge of its force and weight, and of the proper inferences from the facts proven. But this was not all the evidence. The witnesses were face to face before the judge and jury. The prisoner was before them. They saw him in the ordeal of examination. They scrutinized his countenance, his demeanor, his words, his tone. They were to judge of his veracity. They discredited his denial of guilt. They saw and heard all the witnesses, all the circumstances of the trial,—often silent,

but potential, evidence of the real truth. That judge and those jurors would average with us, had we been present, in capacity to judge of evidence; and as we have nothing of the actual appearance of the trial, and only the evidence in cold type, they are vastly more competent than we to pass safe judgment upon the facts. We are not a jury. We have power—mere power—to discredit verdicts: but we must be cautious in so doing.

Why have juries, if appellate judges are to go into the business of weighing evidence as if by the ounce and pound? We ought not to do this. It is an abuse of power, and a misconception of our functions and of the jury function. The jury institution is sacred under our Constitution, and a verdict is to be highly respected. In long experience, I must say that, as a general thing, they evince good sense and do justice. From the frequency of requests to us to set aside verdicts, it seems to be thought that we can and will do so merely because we would not have found, judging from type, the same verdict; but such is not the rule, though instances deviating from these principles may be found, and I am very much averse to looseness in this matter on the part of appellate courts. And then, too, we must not forget that a learned and experienced judge approved the verdict, after witnessing the trial; and his opinion is entitled to great respect in an appellate court. *State v. Hunter*, 37 W. Va. 744, (17 S. E. 307). We must be careful lest we set ourselves up as judge and jury present at the trial, and usurp their functions. We must affirm the judgment. *Gilmer v. Sydenstricker*, 42 W. Va. 57 (24 S. E. 566.)

Affirmed.

CHARLESTON.

STATE v. WATTS.

Submitted January 22, 1897—Decided March 24, 1897.

INTOXICATING LIQUORS—*Indictment—Prescription of Physician.*

Indictment against physician for issuing prescription under sections 6 and 7, chapter 32, of the Code, to aid druggists in violation of provisions of said chapter, *held* sufficient. (p. 185.)

Error to Circuit Court, Wayne county.

Alvis Watts was indicted for issuing prescriptions to aid druggists to violate the liquor law, and brings error. From a judgment sustaining the demurrer to the complaint the state brings error.

Reversed.

T. S. RILEY, ATTORNEY GENERAL, for the State.

McWHORTER JUDGE:

Alvis Watts was indicted in the Circuit Court of Wayne county on the 30th day of January, 1896, which indictment is as follows: "State of West Virginia, Wayne county, to wit: The grand jurors of the State of West Virginia in and for the body of the county of Wayne, impaneled and sworn in the Circuit Court of said county, and now attending said court upon their oaths, present that Alvis Watts, a practicing physician, in said county, on the 1st day of January, 1896, for the purpose of aiding one Fitzhugh Stephens, a licensed druggist doing business as such in said county, in violating chapter 32 of the Code of West Virginia, in the unlawful sale of spirituous liquors, did unlawfully give one G. W. Fry a written prescription for spirituous liquors, specifying therein the said G. W. Fry as the person to whom said liquors were to be furnished by said Fitzhugh Stephens, druggist, together with the kind and quantity of liquors to be so furnished, and did in said prescription falsely, knowingly, and unlawfully state that said spirituous liquors so prescribed were absolutely necessary as a medicine, and not to be used as a beverage; he, the said Alvis Watts, then and there well knowing that said spirituous liquors so prescribed for the said G. W. Fry were not absolutely necessary as a medicine for the said G. W. Fry, and were to be used by him as a beverage, against the peace and dignity of the State. Found at the January term, 1896, of said court, upon the information of G. W. Fry, sworn in open court, and sent before the grand jury to give evidence before that body,"—to which indictment the defendant appeared and demurred, which demurrer the court sustained on the 26th day of May, 1896, and discharged the defendant, from which judgment the State was allowed from this Court a writ of error.

The indictment was made under that clause of section 6, chapter 32, of the Code, which provides that "no sale of alcohol, except for mechanical or scientific purposes, spirituous liquors or wine shall be made by any druggist under the provisions of this chapter, except upon the written prescription of a practicing physician in good standing in his profession, and not of intemperate habits, specifying the name of the person and the kind and quantity of liquors to be furnished him, and stating that such liquors, so prescribed, are absolutely necessary as a medicine for such person, and are not to be used as a beverage, and not more than one sale shall be made upon the same prescription"; and of the first clause of the succeeding section, which says: "If any physician shall, for the purpose of aiding a druggist or other person in the violation of any of the provisions of this chapter, or otherwise, give such prescription and make such statement falsely, he shall be guilty of a misdemeanor and fined not less than fifty nor more than two hundred dollars." In *State v. Riffe*, 10 W. Va. 794, this Court held that in an indictment for a statutory offense it is generally proper and safest to describe the offense in the very terms used by the statute for that purpose; and further it held that, "if the words of the statute are not employed, other words clearly equivalent must be used, so as to bring the offense charged within the provisions and limitations of the statute defining or creating it."

The attorney for defendant does not point out any particular grounds of demurrer. I have carefully compared the indictment with the statute under which it is drawn. The only point which I can conceive could be raised as to the sufficiency of the indictment is in laying the venue, which is as follows: The grand jurors "upon their oaths present that Alvis Watts, a practicing physician, in said county, on the 1st day of January, 1896, for the purpose of aiding one Fitzhugh Stephens, a licensed druggist doing business as such in said county, in violating chapter 32 of the Code of West Virginia, in the unlawful sale of spirituous liquors, did unlawfully give," *etc.* If it be contended that the words "in said county," after the word "physician," are merely descriptive of the person, then they are mere surplusage, and mean nothing; if used to lay the

venue, they make complete sense, and show that said physician, on the day mentioned, did do the act in said county in said indictment charged. There are two or three other ways in which it might have been stated with equal, but no more, certainty, yet probably with a little more elegance of diction. For instance, "that Alvis Watts, a physician, did, on the 1st day of January, 1896, in the county aforesaid, unlawfully, for the purpose," *etc.*, or "that Alvis Watts, a physician, on the 1st day of January, 1896, did, in the county aforesaid, unlawfully, for the purpose," *etc.* If the words "practicing" and "physician" had been transposed in the indictment so as to read, "that Alvis Watts, a physician practicing in said county," the indictment would have been clearly bad, because the words "in said county" would have qualified the word "practicing" by showing where it was done. If it had been intended to be descriptive of the person, the preposition "of" would have been used instead of "in," so it would have read "a practicing physician of said county," in which case the indictment would have been bad. I am of the opinion that the indictment is sufficient under the statute. Therefore the judgment of the circuit court is reversed, and the case remanded for further proceedings to be had therein.

Reversed.

CHARLESTON.

STRALEY *et al.* v. PAYNE.

Submitted January 25, 1897—Decided March 24, 1897.

43	185
46	150

43	185
164	132

1. JUSTICE OF THE PEACE—*Certiorari*—*New Trial*

Where a justice renders judgment on a verdict on one day, and the next day a motion for a new trial is made and overruled, the ten days allowed for a *certiorari* begins to run on the latter day. (p. 188.)

2. JUSTICE OF THE PEACE—*New Trial*—*Suspension of Judgment.*

A motion for a new trial suspends the finality of a judgment already entered, until the date of the denial of the new trial, for the purposes or limitation of writ of error. (p. 187.)

3. JUSTICE OF THE PEACE—*Oath of Jury—Verdict.*

Where a summons before a justice demands judgment for a fixed sum for money due on contract, and a jury, demanded by defendant, is sworn to try all matters of difference between the plaintiff and defendant, and a true verdict given according to the evidence, the verdict will not be set aside only because after such oath, and before evidence given, the plaintiff states his cause of action. The oath relates to all matters of fact involved in the case, though the complaint was stated or filed after the oath. (p. 188.)

Error to Circuit Court, Mercer county.

Action by Straley & Co. against one Payne. Judgment for plaintiffs before a justice reversed on *certiorari*, and plaintiffs bring error.

Reversed.

JOHNSTON & HALE for plaintiffs in error.

HUGH G. WOODS for defendant in error.

BRANNON, JUDGE:

Straley & Co. recovered a judgment against Payne before a justice on a demand under contract, upon a verdict of a jury, and Payne sued out a writ of *certiorari*, and upon it the Circuit Court reversed the judgment of the justice, and set aside the verdict; and Straley & Co. obtained from this Court a writ of error.

The first point made by the plaintiffs in error is that the writ of *certiorari* was sued out later than ten days from the date of the judgment. The verdict was returned on the 11th day of June, and on that day the justice entered judgment on it. On the next day the defendant asked a new trial, and the justice overruled his motion. Shall we commence counting the ten days' limiting a writ of *certiorari* from the 11th or the 12th of June? First, let us look at our statute law. Section 114, chapter 50, Code 1891, provides that in specific cases judgment shall be entered without delay after the trial, but that in other cases judgment shall be entered within twenty-four hours after the trial. Section 91 gives the party twenty-four hours after the return of a verdict to move for a new trial. It might be said, under these provisions, that judgment ought not to be entered until

the expiration of the twenty-four hours; but it can be plausibly said that, when there is such motion for a new trial, the date of the judgment, for the purposes of appeal, is after final action on it. It requires a final judgment to warrant an appeal or *certiorari*. Till then the matter has not passed from the power of the court. I think the law, outside of any statute, is properly stated in Elliott, App. Proc. § 119, to the effect that the right of appeal, as a general rule, dates from the time that a complete judgment is rendered and recorded, and that where a motion in arrest, or a venire *de novo*, or for a new trial, remains undisposed of, there is no right of appeal, and where the court decides to reconsider its judgment the right of appeal dates from the ultimate judgment, and, on the same principle, that where there is a pending motion for a new trial the right of appeal does not mature until there is a ruling denying the motion. I would say that, if the party enters such motion, he could not appeal until it was decided against him; and that would seem to be mutually operative on both sides, and to be a test decisive of the question. 2 Enc. Pl. & Prac. 137; *Railroad Co. v. Doane*, 105 Ind. 93, (4 N. E. 419).

In *Brockett v. Brockett*, 2 How. (U. S.) 238, it was held that a petition filed for a rehearing during the term, and entertained by the court, suspended the decree until it was disposed of, and that an appeal dates from the order denying the rehearing. So, in *Memphis v. Brown*, 94 U. S. 715: "It is the uniform practice in this State to enter judgment at once, in the Circuit Court, upon the verdict of a jury or a finding of the court. For many purposes the judgment is a final judgment, from the date of its entry. Questions of interest and limitation are determined by that date, yet the right of appeal does not exist until a motion for a new trial, if filed, is finally overruled, and may be then exercised, although this is done at a subsequent term. As long as the county court treated this matter as still pending before it, the respondent had no right to assume that its judgment was final. When it finally disposed of the matter, he could exercise his right of appeal, even though its former determination was in the nature of a final judgment. *Boggs v. Caldwell Co.*, 28 Mo. 586, leaves no doubt on that point." *Lakenan v.*

Railroad Co., 36 Mo. App. 362; *Ex parte Lowe*, 20 Ala. 380. So the *certiorari* was taken in time, as time does not commence to run against it until the 12th day of June, and it was sued out on the 22d.

This brings us to the question whether the circuit court is justified in setting aside the judgment of the justice and granting a new trial. The grounds stated to sustain that reversal are two: First, it is said that the justice failed to enter upon his docket the amount of money claimed by the plaintiff. Section 178, chapter 50, Code 1891, does direct that the justice shall enter in his docket the amount of money which the plaintiff demands, but this is merely directory, and its omission cannot be cause for reversal; certainly not when, as in this case, the summons served upon the defendant definitely states the amount of the claim, and the docket entry of a later day (the day when the trial took place, and before the verdict) states the amount of the plaintiff's claim very definitely. The second point made to justify the reversal of the judgment is that the statute requires a complaint, in writing or orally, before there can be a trial, and that the justice erred in swearing the jury before issue, as there could be no issue until the complaint, written or oral, had been made by the plaintiff. This is very technical, under the record in this case. The summons made a demand for a specific sum of money due by contract, and by demanding a jury the defendant controverted that claim, and the jury was sworn by the justice to well and truly try the matters in difference between the plaintiff and defendant; and immediately after this statement in the docket it is stated that "at the time of the trial of this case, and before any evidence was introduced before the jury, the plaintiffs made their complaint orally" (definitely specifying the cause of action). Now, we cannot say certainly that this statement of the cause of action was after the swearing of the jury; but, if it were, would not that oath apply to the cause of action thus stated, whether it was stated after or before the administration of the oath? It would certainly apply to the summons. It is true that *Ruffner v. Hill*, 21 W. Va. 152, decides that a verdict of a jury in a court of record, without issue, is irregular; but does it decide that a verdict shall be set aside, as without an issue, simply be-

cause that issue was entered after the swearing of the jury to try it, when the oath suited the character of the issue? The court has not gone that far. This oath, whenever administered, was broad enough to cover the matter presented by this oral complaint. There are no formal issues before justices, and great liberality is allowed to cure unsubstantial irregularities in their procedure. I do not think this doctrine, at any rate, applies to proceedings before justices, as I state in the case of *Simpkins v. White*, 43 W. Va. 200 (27 S. E. 361).

No other error is specified against the judgment of the justice. We therefore reverse the judgment of the circuit court and affirm the judgment of the justice.

Reversed.

CHARLESTON.

SWEETLAND *et al.* v. PORTER, SHERIFF, *et al.*

Submitted January 21, 1897—Decided March 24, 1897.

1. **ACTIONS—Parties.**

A party cannot be both plaintiff and defendant in an action at law. (p. 190.)

2. **PARTIES—Identity of Name—Identity of Person.**

The identity of name of a plaintiff and a defendant, in the absence of proof to the contrary, is presumption of identity of person. (p. 190.)

Error to Circuit Court, Lincoln county.

Action by the State of West Virginia, for the use of L. A. Sweetland and J. S. Sweetland, partners as Sweetland Bros., against J. D. Porter, J. S. Sweetland, and others. Demurrer to the declaration sustained, and plaintiffs bring error.

Affirmed.

J. E. CHILTON, for plaintiffs in error.

CAMPBELL & HOLT, for defendants in error.

McWHORTER, JUDGE :

This was an action of debt on sheriff's official bond, brought in the Circuit Court of Lincoln county, August 19, 1893, in the name of the State of West Virginia, for the use and benefit of L. A. Sweetland and J. S. Sweetland, partners as Sweetland Bros., against J. D. Porter, late sheriff of Lincoln county, and his sureties, J. S. Sweetland being one of said sureties and a defendant to the action. Defendants appeared and demurred to the declaration, and each assignment of breach therein, which, being argued, was sustained by the court on the 29th day of August, 1895; and the court, being of the opinion that the declaration could not be amended, dismissed plaintiffs' action, with costs, but without prejudice to any new action the plaintiffs might be advised to bring, from which judgment a writ of error from this Court was allowed the plaintiffs.

The assignment of error is "that said declaration stated a good and sufficient cause of action against the defendants, and there were no grounds upon which to sustain a demurrer to said declaration and dismiss the action." No proposition seems to be better settled than that a party can not be both plaintiff and defendant in an action at law. In the writ J. S. Sweetland is named as plaintiff and J. S. Sweetland as defendant. In the declaration John S. Sweetland is named as plaintiff and J. S. Sweetland as defendant. In the absence of proof to the contrary, the presumption must be that the plaintiff John S. Sweetland in the declaration is the identical person named by initials, only, in the writ as plaintiff, and that the defendant J. S. Sweetland is identical with the plaintiff J. S. Sweetland. *Tarener v. Barrett*, 21 W. Va. 656, 689. In *Pearson v. Nesbit*, 1 Dev. 316, Judge Henderson, in delivering the opinion of the court, says: "A suit at law is a contest between two parties in a court of justice, the one seeking, and the other withholding, the thing in contest. The same individual cannot be at the same time both the person seeking and the person withholding, for it involves an absurdity that a person should seek from himself or withhold from himself. * * * When adversary rights as creditor and executor, or debtor and execu-

tor, meet in the same individual, the law considers the contest as settled, at least so long as the union exists. As soon, therefore, as it appears to the court that the same individual is both plaintiff and defendant, any judgment entered up in the cause is, to say the least, erroneous, and should be reversed." See, also *Eastman v. Wright*, 6 Pick, 316. The judgment of the Circuit Court is affirmed, with costs to the appellees.

Affirmed.

CHARLESTON.

DAVIS v. TRUMP *et al.*

Submitted January 25, 1897—Decided March 27, 1897.

43	191
44	207
45	191
46	20
43	191
60	388
43	191
61	136

1. RES ADJUDICATA—*Pleading—Question for Court.*

A plea of former judgment on the same cause of action in bar of the plaintiff's suit, replied to by "No such judgment," should be tried by the court by an examination and inspection of the record, and it is improper to submit the same to a jury. (p. 192.)

2. JUSTICE OF THE PEACE—*Justice's Docket—Entry of Judgment.*

By section 180, chapter 50, Code, all formalities in the entries of a justice's judgment are dispensed with, and the same is sufficient if the truth be stated so as to be intelligible. (p. 195.)

3. RES ADJUDICATA—*Form of Judgment.*

Where the plaintiff already has an intelligible judgment, though defective in form and grammar, against the same parties on the same cause of action, he is precluded thereby from instituting another suit therefor before another justice, or in court. (p. 195.)

Error to Circuit Court, Raleigh county.

Action by Albert Davis against R. G. Trump and H. S. Morris. Judgment for plaintiff, and defendants bring error.

Reversed.

JAMES H. MCGINNIS and JOHN W. MCCREERY, for plaintiffs in error.

A. P. FARLEY, for defendant in error.

DENT, JUDGE:

Writ of error to the judgment of the Circuit Court of Raleigh county in favor of Albert Davis against R. G. Trump and H. S. Morris for the sum of one hundred and twenty-four dollars, interest, and costs. The facts are as follows: On the 28d day of December, 1893, plaintiff brought suit against the defendants before A. W. Warden, a justice of Raleigh county, for the sum of two hundred dollars, evidenced by note. Defendants appeared, and entered three pleas,—*nil debet*, former judgment on same note, and release of R. G. Trump, surety, by the acts and negligence of plaintiff. After hearing the evidence, the justice gave judgment against H. S. Morris, but dismissed the action as to the surety, Trump. The plaintiff appealed to the circuit court. The same pleas were in, but, so far as the record discloses, no issue was made thereon, other than orally, either before the justice or in court, and the record fails to show that even oral issue was joined. In the circuit court the trial was had alone on the plea of former judgment, to which there was no replication of *nil tuel* record, but nevertheless a trial was had by a jury on this plea; but, when the defendants offered to introduce the record in support of their plea, and the justice who rendered the judgment, to prove the identity of the same, the court excluded both the justice and his record, and therefore there was nothing the jury could do but find in favor of the plaintiff.

The first error committed by the court was in submitting a plea of former judgment to a jury, and then finally determining it himself by excluding the pleaders' evidence in support thereof. It is elementary law that a plea of this character must be tried by the court by inspection of the record. 2 Tuck. Comm. 274. If the plaintiff admits the existence of the record, that ends the matter, for the plea bars his suit. If he wishes to deny it, he does so by replying that there is no such record, which he prays may be inquired of by the record. The plea should also set

forth the portion of the record relied on, so that issue may properly be joined thereon, and the court may examine and compare the record with the recital in the plea. This is a certain, easy, and fixed rule of practice, and, if complied with, would tend to promote the ends of justice without delay. Neglected, it produces confusion, blunder, and unnecessary costs. To get at the very gist of the case, the only question for the determination of this Court is whether there was such a judgment as the defendants sought to rely upon so imperfectly in their plea, which, however, was not objected to for uncertainty and insufficiency. To sustain their plea, the defendants offered the justice's docket, containing the following record:

"Albert Davis, Plaintiff, vs. H. S. Morris and R. G. Trump, Defendants.

"Plaintiff filed note on defendants for \$200.00 due on 3d of Nov., 1891, after date of note, issue summons against defendants for said amount on 12th day of October, 1892, and made returnable at Callaway's store on the 18th day of October, 1892, and placed in the hands of A. F. Hawley, constable of Trap Hill district, Raleigh county, West Virginia, to be executed and returned at said place by the 18th day of October, 1892. C. L. Lester, J. P."

"Callaway's Store, Raleigh County, West Virginia, Trap Hill district, October 18th, 1892. This cause came on to be heard, summonses returned executed, plaintiff being present. Defendants not appearing plaintiff's demanded judgment for \$112.00 and costs, amounting to \$2.50. Judgment was rendered in favor of plaintiff. C. L. Lester, J. P.

Justice's costs	\$1 70
Constable's cost	80

Total cost..... \$2 50

"Issued execution on the above judgment on the 20th day of October, 1892, and delivered to A. F. Hawley, constable of Trap Hill district, Raleigh county, West Virginia, to be executed and returned in sixty days from date of execution. C. L. Lester, J. P."

"Execution No. 1 returned before me on the 18th day of February, 1893, showing that a levy on one gray horse, household and kitchen furniture, the property of Dr. H.

S. Morris, to satisfy an execution in my hands in favor of Albert Davis, this, the 25th day of October, 1892, A. F. Hawley, C. R. C. C. L. Lester, J. P."

"Execution No. 2 renewed the 18th day of February, 1893, at plaintiff's request, against H. S. Morris and R. G. Trump, in favor of Albert Davis; levy No. 1, execution transferred to No. 2 execution, this, the 18th day of February, 1893, the execution returned, 'Property not sold.' C. L. Lester, J. P."

"Execution No. 2 renewed to be in full force for 60 days from the 18th day of April, 1893. C. L. Lester, J. P."

"Renewed execution returned before me on the 14th day of October, 1893, showing credit by cash of \$2.10, showing on its face that the property being not sold for the reason that was requested by plaintiff to hold up and not sell. C. L. Lester, J. P."

The justice testified that this judgment was rendered on the same note sued on in the present case. The circuit court excluded this evidence, in effect holding that it did not sustain the defendants' plea; in other words, that there was no judgment. This is certainly a very technical holding, for the record shows that the suit was between the same parties, on the same or similar note, and that the justice, at the instance of the plaintiff, and in the absence of the defendants, gave judgment for the balance claimed to be due, to-wit, one hundred and twelve dollars and two dollars and fifty cents costs. Of course, the judgment could have been written out with greater formality, which the justice might do at any time, having at once put all the essentials thereof on his docket. The defendants never objected to this judgment, but admitted its binding force and character. And, if they had, it would have availed them nothing, for, having all the essentials of party, amount, rendition, *etc.*, the justice could have extended it, so as to make it just as formal as required by the most fastidious and technical defendant. It is claimed that the plaintiff released the defendant's property taken in execution, and ordered the return of the execution, and then brought a new suit before another justice on the same note, through fear that he would get into trouble because the first judgment was defective. To get out of the open

woods, he wandered into the wilderness. If dissatisfied, why did he not have the justice spread his judgment out more at length? This was unnecessary, for the reason that this Court, in dealing with the proceedings or justices, have uniformly conformed to the rule that no defect therein shall render the same invalid if such proceedings are sufficient to show what was intended thereby, especially when collaterally attacked. Sections 178, 179, chapter 50, Code, among other things, provide that the justice shall enter in his docket the title of the action, *etc.*, under which "the judgment of the justice shall be stated, with the items of the costs included therein." Section 180, same chapter, provides that, "so far as the entries in the docket are concerned, the form shall be regarded as immaterial, if the truth is stated so as to be intelligible." This means "intelligible to a person of ordinary intelligence," and not so plain that "a fool who runs may read." The justice is not required to enter the title to the action more than once in his docket, and, if all the orders in such action are immediately under such title, though the entry be at different times, such entries are sufficiently intelligible to be understood by those of ordinary intelligence. Good grammar is not essential to a good judgment. The mistake of a proper tense will not render a justice's judgment unintelligible or invalid. Justices are not usually educated men, learned either in the intricacies of law or grammar; hence their records must be scanned with the greatest leniency. Such are the provisions of the statute and the holdings of the courts. 1 Freem. Judgm. § 55; *Story v. Kimball*, 6 Vt. 541; *Anderson v. Kimbrough*, 5 Cold. 260; *Barrett v. Garragan*, 16 Iowa, 47; *Church v. Crossman*, 41 Iowa 373; *Fish v. Emerson*, 44 N. Y. 376; *Faulk v. Kellums*, 54 Ill. 189.

Neither is it proper or just that a plaintiff who supposes that a judgment has been defectively entered in his favor by one justice should be permitted to bring another action for the same cause before another justice. But he should have the defective judgment corrected, which the justice has the right to do, on his motion, as to any clerical error committed by him, he being his own clerk. "In whatever respect the clerk may have erred in entering judgment, the court may, on proper evidence, nullify the error by

making the judgment entry fully and correctly show the judgment rendered." 1 Freem. Judg. § 72. This rule prevails, even though both clerk and court is one and the same person, and it covers mistakes which arise from lack of literary attainment, as well as from inadvertance. Such being the law, there is no reasonable justification for the present suit: the plaintiff's cause of action having already merged into a judgment. The judgment of the circuit court is therefore reversed, and the plaintiff's action is dismissed.

Reversed.

CHARLESTON.

McMANUS v. MASON.

Submitted January 27, 1897—Decided March 27, 1897.

43	196
49	223
43	196
65	83

1. **WITNESS—Cross-Examination—Error.**

Where a defendant in an action of *assumpsit* for services rendered him by plaintiff, as a witness in his own behalf denies that he ever contracted with the plaintiff, and that he ever employed him for any purpose, and had nothing to do with his employment, and did not owe him a cent, the question, "Did you ever give plaintiff any directions about the work for the price of which he has brought this action?" is proper on cross-examination, and it is error to exclude it. (p. 198.)

2. **WITNESS—Cross-Examination—Defendant.**

Where the defendant appears as a witness in his own behalf, the plaintiff has the right to so cross-examine him as to elicit any facts which would in any way tend to corroborate the testimony of plaintiff, or contradict that of defendant. (p. 198.)

3. **TRIAL—Practice in Trial Courts—Evidence.**

The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the trial courts, with which this Court ought not to interfere; and the trial courts must necessarily be vested with a large discretion in the regulation of their practice (*Railroad Co. v. Stimpson*, 14 Pet. 463), but such discretion does not extend to the exclusion of legal evidence offered in its proper order. (p. 199.)

4. **EVIDENCE—Letters as Evidence—Error.**

After the cross-examination of the defendant, the only

witness for the defence, the plaintiff was recalled by his counsel for the purpose of identifying and then reading in evidence two letters purporting to be written by the defendant, and which had not before been offered. On objection of defendant, this evidence was not admitted. *Held*, that the court did not err in excluding it. (p. 199.)

Error to Circuit Court, Greenbrier county.

Action by William V. McManus against S. B. Mason.
Judgment for defendant, and plaintiff brings error.

Reversed.

L. J. WILLIAMS, for plaintiff in error.

JOHN W. HARRIS, for defendant in error.

McWHORTER, JUDGE :

McManus brought his action of *assumpsit* in the Circuit Court of Greenbrier county against Mason, on account for services rendered as superintendent of brick masonry on tunnel under Seventh street, Richmond, Va. Issue was joined on plea of *non assumpsit*, a jury impaneled, and the case was tried on November 16, 1895. Plaintiff, to maintain the issue on his part, testified "that he lived at Kingsbridge, N. Y.; that he was a labor contractor; that in the month of February, 1893, he contracted with the defendant to superintend, at the price of two hundred dollars per month, the brick masonry in arching a railroad tunnel in the city of Richmond, Va.; that said defendant agreed to pay him by the month for said work at the price aforesaid; that plaintiff began said work for the defendant on the 15th day of February, 1893, and superintended the same until the first day of July following; that the action filed by plaintiff, which is in the words and figures following [here follows bill of particulars, amounting to nine hundred dollars], is correct and unpaid; that no part of the nine hundred dollars has been paid, and that the same is still due; that the price of two hundred dollars per month, agreed upon, was reasonable; that the defendant furnished the material and employed the hands who worked under defendant; and that defendant never disclosed to plaintiff that any one else was interested with him in the contract for the building of the tunnel,"—and here rested his case. The defendant, to maintain the issue on his part, testified "that he never contracted with the plaintiff to pay him

\$200 per month for superintending the brick masonry in arching the railroad tunnel at Richmond, Va.; that he had never employed the plaintiff for any purpose, and had nothing to do with his employment, and did not owe him a cent,"—and here rested. The plaintiff proceeded by his counsel to cross-examine the defendant. The defendant testified, in answer to certain questions so asked him, that some work had been done on the tunnel before he went there; that, after he went there, he drove up the approach cut, and had taken out the full section of the tunnel for about seventy-five feet, and had taken out a part of the heading; and the plaintiff's counsel then, for the avowed purpose of contradicting the defendant's testimony, and laying the foundation for his rebutting testimony, put this question to the witness, "Did you ever give plaintiff any directions about the work for the price of which he has brought this action?" to which question, and the answer made to the other questions asked by plaintiff's counsel above, the defendant, by his counsel, objected, as not being by way of cross-examination, and as irrelevant, which objection the court sustained, and struck out said answers, and refused to allow said last-mentioned question to be answered, to which ruling of the court the plaintiff excepted.

The defendant's counsel says: "It is a well-settled rule that, in order to reverse the judgment of a lower court, it must affirmatively appear that error was committed prejudicial to the appellant, and, no answer having been made to this question, the court cannot say that the exclusion of the answer was prejudicial,"—and cites *Taylor v. Boughner*, 16 W. Va. 327; *Rigdon v. Jordan* (Ga.) 7 S. E. 857; *McDowell's Ex'rs. v. Crawford*, 11 Grat. 387; *Harman v. City of Lynchburg*, 33 Grat. 37; *Nease v. Capchart*, 15 W. Va. 300; *Johnson v. Jennings*, 10 Grat. 1. Upon cross-examination of defendant, plaintiff had the right to so cross-examine him as to elicit any facts which would in any way tend to corroborate the testimony of plaintiff, or contradict that of defendant. "The general rule requiring testimony to be confined to the point in issue is much more liberally construed in the cross-examination of witnesses than in their examination in chief. While the party who introduces a witness vouches for his credibility, the cross-

examiner sustains no such relation to the witness. He is at liberty and often compelled to attack the credibility of the witness, and for that purpose must be allowed wide latitude in asking questions which would otherwise be wholly irrelevant to the issue." 3 Jones, Ev. § 826. If the question asked, "Did you ever give plaintiff any directions about the work for the price of which he has brought this action?" was pertinent and relevant,—and I am of the opinion that it was, and clearly so by way of cross-examination,—the court erred in excluding the question, whatever might have been the materiality or immateriality of the answer when given; and, being in the line of proper cross-examination, the plaintiff was virtually cut off from his right of cross-examination by the ruling of the court in excluding the question. The plaintiff was then again placed on the stand, for the avowed purpose of having him identify and then read in evidence two letters which purported to be written by the defendant,—one dated at Richmond, Va., February 17, 1893, addressed to plaintiff; the other dated at Lewisburg, W. Va., April 30, 1894, addressed to "A. Bernard, Chancellor, Esq.,"—to which defendant objected, and the objection was sustained. As stated in *Railroad Co. v. Stimpson*, 14 Pet. 463: "The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the circuit courts, with which this court ought not to interfere;" and that "the circuit courts must necessarily be vested with a large discretion in the regulation of their practice." But this discretion does not extend to the exclusion of legal evidence offered in its proper order.

The appellant's assignment that the court erred in sustaining the objection of the defendant's counsel to the introduction of the letters at the time and in the manner proposed by plaintiff is not well taken. The court had the right, in the exercise of a sound discretion, to so exclude that evidence.

For the reason above stated, the judgment rendered on the 16th of November, 1895, is reversed, the verdict set aside, and a new trial granted.

Reversed.

CHARLESTON.

SIMPKINS v. WHITE.

Submitted January 21, 1897—Decided March 27, 1897.

NEW TRIAL—*Vacating Judgment—Surprise.*

During the term of court, the counsel representing the parties plaintiff and defendant in a case, in the presence of the regular judge, are talking over the business remaining unfinished, the defendant in said case being present, who understands from the conversation that his case should not be taken up before the next Tuesday for trial, which conversation was on Friday; and under this impression the defendant, with his witnesses, left the court. On Saturday a special judge was elected, who went upon the bench on Monday morning, and tried the case, in the absence of said defendant and his witnesses, and in ignorance of said misunderstanding, although an attorney for the defendant was in town, and had notice that a jury was being called in the case, and refused to go to the court house, on account of some feeling existing between himself and the special judge, and on account of his being too unwell to attend to business, and sent another attorney to state the matters to the court in reference to said understanding. The trial is proceeded with, and a judgment is rendered against the defendant, although he claims to have had a good defense. The trial of the cause, under the circumstances, works such a surprise upon the defendant that a motion to vacate the judgment, set aside the verdict, and award a new trial, should have prevailed. (p. 206.)

Error to Circuit Court, Mingo county.

Action by Joseph Simpkins against H. S. White. Judgment for plaintiff. From an order refusing to vacate the same, defendant brings error.

Reversed.

H. K. SHUMATE and BROWN, JACKSON & KNIGHT, for plaintiff in error.

MARCUM, MARCUM & SHEPHERD and CAMPBELL & HOLT, for defendant in error.

ENGLISH, PRESIDENT:

This was an action of *assumpsit* brought in the Circuit Court of Logan county, but afterwards transferred to

Mingo county, in which Joseph Simpkins was plaintiff, and H. S. White was defendant. On the 16th day of September, 1895, the defendant not appearing, the case was submitted to a jury, upon the issue joined, and resulted in a verdict for the plaintiff for two thousand two hundred dollars, and judgment was rendered upon said verdict, with interest thereon from the date of said judgment and costs; and on the same day the defendant, by his attorney, moved the court to vacate the judgment entered therein, and to set aside the verdict of the jury, upon the ground that he was not present at the trial, for the reason that it was his understanding that the case had been postponed to, and would not be called for trial until the 17th inst., and he was taken by surprise. After hearing the evidence, the court over-ruled the defendant's motion, and refused to vacate said judgment, and set aside said verdict, and grant a new trial, to which ruling the defendant excepted, and applied for and obtained this writ of error.

The difficulty in this case seems to have arisen from the fact that, the regular judge having absented himself, a special judge was elected to proceed with the trial of the docket. It appears from the testimony of Thomas H. Harvey, who was the regular judge of that court, that at the dinner table on Friday (Mr. White, the defendant, and Mr. Shumate, his attorney, and Mr. Shepherd, attorney for the plaintiff, Joseph Simpkins being present) there was a conversation of which Judge Harvey says: "In the meantime I had set two felony cases for Monday. * * * I didn't think it possible that case should come up before Tuesday morning. Mr. Shumate agreed with me that he did not think it could come up, and Mr. Shepherd said that if it didn't come up before Tuesday, that he wouldn't be here. I didn't set the case at the court house, and, if I had been here, this case would not have been tried Monday before the train got here. * * * If I had been here Monday morning, we would have gone into the felony cases, and that case (meaning the one under consideration) would not have come up before Tuesday. That is my idea of the case. I did not, in court or out of court, set the case for any particular day. There were only two cases set,—*Sparks* against the *R. R. Co.* The lawyers agreed on Tuesday as the day, and I acquiesced in it."

It appears that C. M. Turley was elected special judge on Saturday, and that the defendant, H. S. White, was aware of his election on Saturday. The case was heard in the forenoon on Monday, said special judge presiding. The defendant, H. S. White, in response to the question, "State why you were not here on Monday last?" said: "I had been here nearly all of last week on this case and others during the latter part of the week. I was under the impression it was on Saturday that Judge Harvey was going away, and that a special judge would be elected, and he was calling the docket (Judge Harvey was), and running down the list; and I understood that the railroad case, one of them, would be probably tried by the special judge, and, when he came to the case of *Simpkins v. White*, the judge looked around and smiled,—Judge Harvey did; and I understood that there was another case that would keep them busy until Tuesday, and that he would take this case up Tuesday. I was sitting right here, watching the court, and Mr. Shumate was near by. I took the train home, and when at the train that afternoon, I saw some of my witnesses, and told them that I would probably telegraph them on Tuesday if the case came up, and to be ready to come. I told them that I understood the case would go over until Tuesday, as it would take three or four days to try it; that was the impression made on my mind; that Judge Harvey would be back Monday; and that the special judge would not take it up." This witness further states that he was very much surprised when he heard the case had come off: had made no arrangements to come; had directed his family to have the books and papers ready where they could get them, and catch the train; that he does not think he owed the plaintiff, Simpkins, one dollar, and believes he would be able to have the court, either Judge Harvey or Judge Turley, wipe out the judgment on a fair trial. The error relied on by the plaintiff in error is the action of the court in refusing to vacate and set aside the judgment rendered against him under the circumstances. Did the court err in so ruling?

Now, while it is true that courts should seek as far as possible to avoid unnecessary delays in the trial of causes, and to promote the speedy administration of justice, and, in doing so, they are to a large

extent clothed with discretion, yet that discretion should not be so exercised as to cause it to work a hardship or injustice to the parties litigant. Now, it will be noticed that Judge Harvy, in his testimony, says: "I said there at the dinner table, in the presence of these gentlemen, Mr. Shumate, Mr. White, and Mr. Shepherd, counsel for Mr. Simpkins, I understood that I didn't think it possible that that case would never come to trial, or something of that kind; that I didn't think it possible that that case would come up before Tuesday morning. Mr. Shumate agreed with me that he did not think it could come up." He also says the lawyers agreed on Tuesday as the day, and he acquiesced in it, but that remark may have applied to the cases of Sparks against the railroad company. Mr. Shumate, Mr. White, and Mr. Shepherd, counsel for the plaintiff, were present. Mr. White acted upon this understanding, and instructed his witnesses accordingly, and says that he was surprised when informed that the case had been heard on Monday; that he had a good defense, and could show that he did not owe the plaintiff's claim, or any part of it. It is true, his attorney, Mr. Shumate, was in town, near the courthouse, when the case was called, on Monday; and when informed that the court was calling a jury in the case, feeling too unwell to go to the courthouse, he requested both Mr. Wilson and Mr. Wilkinson, attorneys (the latter of whom was generally employed by said White, but who was not attorney in this case), to go into court, and state the facts; and Mr. Marcum, attorney for Joseph Simpkins, in his testimony says that Mr. Wilkinson came in after the jury had been sworn, and told him what Mr. Shumate had said, that Mr. Shumate would not come in and interfere on account of Mr. Turley, but that he claimed that Judge Harvey had set the case for trial on Tuesday. Mr. Shumate, attorney for White, did not go to the courthouse; but, if he had gone, he could have done nothing more than Wilkinson did for him,—state his understanding that the case was to go over until Tuesday. White, acting on that understanding, had none of his witnesses there; and Mr. Shumate, in the absence of his client and his witnesses, would have been poorly prepared to try the case if he had gone to the courthouse, even if he had been free from sickness himself.

Now, it is readily perceived from the testimony that the injustice which has been done to the defendant, White, in this case, was occasioned by the special judge being unacquainted with the agreement between counsel, in which Judge Harvey says he acquiesced. If Judge Harvey had been on the bench on Monday morning, that agreement would have been enforced, and the case would not have been called for trial until Tuesday; and, if White did not then have his witnesses present, it would have been his own fault, and he could not be heard to complain, as he is now doing as we think with good cause.

The case of *Mason v. McVamara*, cited by counsel for the plaintiff in error (57 Ill. 274), states the law thus: "The well-settled practice in this state has been liberal in setting aside defaults at the term at which they were entered, when it appears that justice will be promoted thereby. The practice has not been so rigid as to require the party moving to set the default aside to bring himself within the strictest rules which govern applications in equity for new trials at law. In such cases the object is that justice be done between the parties, and not permit one party to obtain and retain an unjust advantage." Also, in *Watson v. Railroad Co.*, 41 Cal. 17, the court says: (page 20): "Applications of this character are addressed to the discretion—the legal discretion—of the court in which the default occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and, where the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application." In *Riley v. Emerson*, 5. N. H. 531, it is said by the court: "Where counsel have suffered a verdict

against a party without a trial by a mistake, a review may be granted." Again in *Vere v. Milns*, 29 Eng. Law & Eq. 306, a cause was set down for trial at the first sitting in Michaelmas term, and, no one appearing for the defendant, was taken at these sittings as an undefended cause, and verdict entered for the plaintiff. Upon affidavit by the defendant's attorney that he was under the impression that the cause would be tried at the second sitting in that term, and had made a memorandum according in his note book, the court granted a new trial. So, also, in *De Rouffigny v. Peale*, 3 Taunt, 484, a new trial was granted where a cause had been undefended through mistake of the attorney. So, in *Greatwood v. Sims*, 2 Chit. 269, where in the call of the docket a case had been reached sooner than expected by the attorney, and went undefended on that account, a new trial was granted by the Lord Chief Justice Ellenborough. Also the case of *Bennett v. Jackson*, 34 W. Va. 62 (11 S. E. 734), presents some features similar to the one under consideration. In that case it appears an action was brought in the county court in 1875. Two years thereafter it was transferred to the circuit court. No order except continuances was made in it after such transfer. The judge of said circuit court could not preside at the trial, and in 1887 the plaintiff, in the absence of the defendant and his counsel, caused a special judge to be elected; and, without the knowledge of the defendant, the case was tried, and a verdict and judgment rendered for the plaintiff. The defendant, being notified of such judgment, moved the court to set the same aside, because of the facts above stated; and, upon his affidavit alleging surprise and the full payment of the debt sued on, the circuit court set aside the judgment, and awarded the defendant a new trial, and it was held no error. In that case, as in this, there was the interposition of a special judge, who tried the case in the absence of the defendant, who was surprised by the appointment of the special judge, and had made no preparation for trial on that account, knowing that the regular judge would not try the case.

In the case we are considering, it appears that the regular judge would not have tried the case on Monday, the day on which it was tried if he had been on the bench,

and the defendants knew he would not, on account of the agreement between counsel in his presence, which the regular judge says was acquiesced in by him, that the case should not be tried until Tuesday. The defendant, in his testimony, claims that he had a good defense to the action, and could have shown that he was not indebted to the plaintiff. The case under consideration presents some peculiar features, and, if the verdict and judgment are allowed to stand, the facts indicate that injustice will be done the defendant. Can we say that, under the circumstances, blame should attach to him for not being present on Monday with his witnesses and with his counsel, prepared for trial? The defendant testifies that his impression was, from the conversation he heard, that Judge Harvey would be back on Monday, and that the special judge would not take up his case, and that he did not know that Mr. Turley would sit on the bench, or that Mr. Shumate, his attorney, would refuse to try a case before him; that he was very much surprised when he heard the case had come off, and had made no arrangements to come. Considering these circumstances, it is apparent that the defendant has been deprived of an opportunity of presenting his defense, by reason of the special judge being unaware of the agreement made by counsel, in the presence of the regular judge; and by acting upon that agreement, which was made in his presence, the action of the special judge in hearing the case at a different day from the one agreed upon, without notice to the defendant, and in the absence of himself and witnesses, was such a surprise upon him that the motion to vacate the judgment, set aside the verdict, and award him a new trial, should have prevailed. The judgment complained of is reversed, the judgment vacated, the verdict set aside, and a new trial awarded, with costs to the plaintiff in error.

Reversed.

CHARLESTON.

SUMMERS COUNTY v. MONROE COUNTY.

Submitted January 28, 1897—Decided March 27, 1897.

1. COUNTY BOUNDARY DISPUTES—*Circuit Court—Ministerial Duties—Mandamus.*

The function of a circuit court, under Code 1891, c. 39, s. 18, in appointing commissioners to settle lines between counties, is ministerial, and legislative or administrative, and the court is without power to refuse such appointment on application of a county court of one of the counties. In case of its refusal, *mandamus* from this Court is the remedy, not a writ of error. This Court has no jurisdiction of such writ of error. (p. 200.)

2. EQUITY JURISDICTION.

The action of a circuit court in such matters is not the exercise of chancery jurisdiction, and should not be entered in the chancery order book. (p. 210.)

Error to Circuit Court, Greenbrier County.

Petition by the court of Summers county for the appointment of commissioners to determine the boundary between such county and Monroe county. From an order refusing to appoint commissioners, and dismissing the petition, Summers county brings error.

Dismissed.

JAMES H. MILLER, for plaintiff in error.

JOHN W. HARRIS, for defendant in error.

BRANXON JUDGE:

The County Court of Summers county passed an order that it appeared to the court that a dispute had arisen between the county of Monroe and the county of Summers as to the boundary line between them, and that a doubt existed as to the location of said line, and ordered that the circuit court be applied to for the appointment of commissioners as provided by statute to have said line settled; and a petition was filed in the circuit court of Summers county, asking it to appoint commissioners, and that court appointed three commissioners for Summers county; and a petition was filed also in the circuit court of Monroe county, asking for the appointment of three commissioners on the part of that county, and the county

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43	245

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court of that county filed an answer to said petition, resisting the application for commissioners; and, the proceeding having been removed to the circuit court of Greenbrier county, that court refused to appoint commissioners, and dismissed the petition, and ordered that the decree of dismissal be entered in the chancery order book of the court; and then Summers county obtained the present writ of error.

We must first see whether this Court has jurisdiction to decide anything further than as to its own jurisdiction to entertain this writ of error. I remark that a county is not strictly a corporation, but a public *quasi* corporation. 1 Beach, Pub. Corp. § 8. I doubt whether a county, as such, can sue in this State, since, under the statute and Constitution, the county court is its perfect representative, performing its functions, and that court is by statute a corporation; but, as this is not a suit dependent on legal title, the petition, though filed in the name of the county, not the county court, will be held as substantially good in that respect. Coming now to the question of our jurisdiction, the Code of 1891 (chapter 39 section 18) provides that, whenever a doubt shall exist or dispute arise as to the boundary line between any two counties, it shall be lawful for the circuit court of the counties interested, or the judge in vacation, to appoint from each of them three commissioners "to ascertain and establish the true line so in dispute," and that the commissioners shall choose an umpire, and they shall take an oath to ascertain the true line in dispute, and make true reports of the same, and that they may cause surveying to be done, and take evidence, and that "when the disputed line shall be ascertained, fixed, and marked," they shall cause to be made three plats of the line, and return one to the clerk of the county court of each county, and the other to the secretary of State, where they shall be recorded, and such plats shall be evidence of the line. The circuit court heard this case upon the petition, answer of the county court of Monroe county, and other papers, just as if it were a lawsuit, deciding apparently upon the merits of the claims of the respective counties in a controverted line, and dismissed the application of Summers county for the appointment of commissioners.

The question arises whether the circuit court had any power to thus refuse. I think not, because I think that under that statute a circuit court does but perform a purely ministerial, not a judicial, function, nor one of discretion. When the county court of a county certifies, in the language of the statute, that a doubt or dispute exists as to such boundary line, it is entitled to have the question decided by the only power known to our laws to so decide it,—the special commission provided by the statute. The merits of the controversy as to the line go before that commission. It cannot be that the court may or may not, as it chooses, appoint such a commission, because the statute says it shall be lawful to do so, thereby, as claimed, giving the court a discretion to do or not to do what it is directed to do. It is a remedy provided for the benefit of the dissatisfied county, and the statute, in saying that it shall be lawful for the court to appoint commissioners, means that it shall be its duty when the state of facts exists pointed out by the statute. A circuit court does not try the merits of the controversy. It simply opens the way for a trial of them before the special tribunal created by the statute. That tribunal does not report to the circuit court its work, for the court's approval, but it goes to the clerks and the secretary of state, and there is no further action contemplated on it. That commission, not the court, hears the controversy. Those commissioners, in the very language of the statute, ascertain, fix, and mark the disputed line. It is not a lawsuit between the counties. It is simply a process pointed out by statute, by which the line fixed by the legislature in the formation of the county shall be ascertained and made certain. Whether the action of that special tribunal can be controlled by a court is not now for us to say. The fact that a court acts in the appointment of this commission does not make its action any the less ministerial. *Mackin v. Taylor County Court*, 38 W. Va. 345 (18 S. E. 632); *Pittsburg, C. & St. L. Ry. Co. v. Board of Public Works*, 28 W. Va. 264. It is the character of the act, not the tribunal doing it, which gives cast to that act. The action of the circuit court being ministerial merely, no writ of error or appeal lies to this Court therefrom. 2 Enc. Pl. & Prac. 25, 26. This Court's appellate jurisdiction is in matters judicial, not merely min-

isterial. *Mandamus* was the proper proceeding to compel the appointment of commissioners by the circuit court. *Doolittle v. County Court*, 28 W. Va. 158; *Randolph v. Stalnaker*, 13 Grat. 523. There is another reason why this court has no jurisdiction, and that is that the action of the circuit court in this matter is legislative, or, rather, administrative of a legislative power or function, not judicial action, because the formation of counties, and the fixing and altering of their boundaries, is purely a legislative function. The legislature can delegate that power to subordinate agencies. *Roby v. Sheppard*, 42 W. Va. 286 (26 S. E. 278); 1 Beach, Pub. Corp. §§ 397, 399. The legislature has delegated its function in settling boundary lines, and given a part of it to the circuit court, in the appointment of commissioners, and the balance to those commissioners. Such being the character of its action, no writ of error or appeal lies to this court, because the functions of this court are purely judicial, as above stated. *In re Town of Union Mines*, 39 W. Va. 179 (19 S. E. 398); *Mackin v. Taylor County Court*, 38 W. Va. 338, (18 S. E. 632); *Pittsburg, C. & St. L. Ry. Co. v. Board of Public Works*, 28 W. Va. 264. As above stated, it must not be thought, because a circuit court is directed to appoint commissioners, an appeal lies from its action. Congress, for instance, directed a district court to pass on certain claims, and report to the secretary of the treasury. It was held that no appeal lay from that court to the supreme court. *U. S. v. Ferreira*, 13 How. 40. We have therefore no jurisdiction to decide upon the merits of the case as presented to the circuit court of Greenbrier county, and will therefore dismiss this writ of error as improvidently granted.

I will remark that this proceeding in the circuit court is in nature a law proceeding, to be entered in the law order book. It has no features to give it place as a chancery suit, and ought not to be recorded in the chancery order book. That book contains only matters purely of chancery jurisdiction. All other matters which a circuit court does are to find their place of record in the common-law order book of that court. Its entry by the court in the chancery order book would itself be reversible error, if we had jurisdiction. *State v. Irwin*, 30 W. Va. 421, (4 S. E. 413.)

Dismissed.

CHARLESTON.

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54	332

BUFORD v. ADAIR *et al.*

Submitted January 27, 1897—Decided March 31, 1897.

1. ABANDONED WIFE—*Foreign Residence—Separate Estate.*

A married woman who has been wholly abandoned by her husband, permanently residing in another state or foreign country, under the rules of the common-law, as settled by the various decision of the various courts of the United States, is restored to all the powers of a *feme sole* as to her separate property. This rule has been extended, modified or abrogated by the statutory enactments of various states. (p. 215.)

2. ESTOPPEL BY DEED—*Heir Apparent—Heirs.*

By deed with covenants of general warranty, an heir apparent may estop herself from afterwards claiming her inheritance. Such estoppel extends to her heirs. (p. 217.)

3. ESTOPPEL—*Res Adjudicata—Material Fact.*

A person who relies upon an adjudication as an estoppel cannot dispute the truth of the material fact on which such adjudication is predicated. (p. 217.)

4. ESTOPPEL—*Res Adjudicata—Adverse Title.*

A party to a suit, who claims title adverse to a former adjudication of this Court, by which he is not bound, cannot rely on such adjudication as an estoppel against parties to such former suit. An estoppel, to be binding, must be mutual. (p. 217.)

5. APPOINTMENT.

The case of *Thrasher v. Ballard*, 35 W. Va. 524, approved, but *held* not to be binding on the parties to the present litigation. (p. 215.)

Error to Circuit Court, Monroe County.

Action by N. W. Buford against Wm. Adair and others. Judgment for defendants, and plaintiff brings error.

Affirmed.

JOS. W. CALDWELL, ALEX. F. MATHEWS and LOGAN & PATTON, for plaintiff in error.

JOHN OSBORNE and L. J. WILLIAMS, for defendants in error.

DENT, JUDGE :

An ejectment suit instituted in the Circuit Court of Monroe county by N. W. Buford against William Adair *et al.* resulted in a judgment for defendants. The plaintiff obtained a writ of error. The facts are as follows: Daniel Stoner deceased, on the 12th day of March, 1845, executed a deed to William Nossinger, trustee, conveying personal and real estate as recited in the deed, "to have and to hold the said tract or parcel of land, and the slaves, bonds and debts and personal property to him the said William Nossinger his heirs or agents by him appointed for the purposes following, That is to say in Trust for the said Matilda Stoner and he the said William Nossinger will & shall permit the said Matilda Stoner during her life to receive and take all the issues rent hires, profits, and interest of the said property, debts, bonds moneys, slaves lands, stock, & apply & do with as she may think proper and the said William Nossinger will permit the said Matilda & the right is hereby given her to dispose of the aforesaid property by will and give such portion thereof as she may think proper to the said Daniel Stoner or the children which they now have or any which they may hereafter have in case the said Matilda Stoner should survive her husband and all of her children, She can dispose of all of the estate as she may think proper. It is further understood that if any of the Children of the said Daniel & Matilda, or any which they may hereafter have, shall marry or arrive of age, that the said William Nossinger shall give to such child, or children such part of the property aforesaid as the said Matilda shall direct. And it is further understood, that if at any time the said William Nossinger should remove from this county or if the said Matilda should wish to have another Trustee appointed in his stead; the said William Nossinger shall appoint such Trustee as the said Matilda shall desire & he the said William Nossinger shall have no further power to act as Trustee of this Deed, & it is further understood, that the said William Nossinger or such Trustee as may be by him appointed is hereby fully authorized & empowered to receive, recover & collect by all lawful means all the property & effects whether real or personal, debts or moneys belonging or owing to the said Daniel Stoner to be applied

as above directed." Afterwards, by successive conveyances, said Daniel Stoner became the trustee, in lieu of William Nossinger. Daniel and Matilda Stoner had two children—Lucy J., who became the wife of L. C. Thrasher, and Letitia S., who inter-married with one Buford by whom she had two sons, the plaintiff being one of them, who claims to hold by purchase his brother's interest in the subject-matter in controversy. On the 30th day of May, 1863, Daniel Stoner, Matilda, his wife, and Letitia S. Buford executed a deed conveying the tract of land, one-half of which is here in controversy, to Leroy C. Thrasher, husband of Lucy J. Thrasher, in consideration of five thousand and five hundred dollars, one thousand dollars of which the grantee was allowed to retain for the benefit of his wife. He paid the residue of the purchase money to the grantors, except one thousand and three hundred dollars, for which latter sum the land was afterwards decreed to be sold, and was purchased by the parties under whom the defendants claim; the balance of the purchase money being received from such sale, and paid to the original grantors. Matilda Stoner died after Letitia S. Buford, leaving a will executed by her in the year 1882, before the death of Letitia S. Buford, by which she devised the whole of said land to Lucy C. Thrasher. She instituted an ejectment suit against the purchasers of said land for the possession thereof, and this Court held that the will of Matilda Stoner was void, upon the supposition that Mrs. Buford was alive at the time of the death of her mother, and that, the appointment, not having been legally executed, the land descended one-half to Mrs. Thrasher and one-half to Mrs. Buford, and adjudged the one-half of the land then in controversy to Mrs. Thrasher.

The plaintiff herein seeks to recover the other half of said land, as having descended to Mrs. Buford, or, as she was dead at the date of the death of Mrs. Stoner, to her heirs, of whom the plaintiff is the sole representative. The defendants, claiming title under the decree of the court aforementioned, and under Mrs. Thrasher, insist that the power of appointment vested in Mrs. Stoner was properly executed, and that the plaintiff has no interest in the land claimed. Mrs. Thrasher's deposition was taken, and she testified on cross-examination by the plaintiff that Mrs.

Buford and her children received between "\$3,000 and \$4,000 of the proceeds of the sale of the land" made to her husband by the Stoners and Letitia Buford; that the money was collected from such sale by her father, from her husband, and invested in land in Wythe County, Va., for the benefit of the two children of Mrs. Buford. H. D. C. Buford, one of the children of Mrs. Buford, and who made a deed to the plaintiff for his interest in this controversy, with covenants of general warranty, and who is thereby interested in the result of this suit, in his testimony undertook to contradict Mrs. Thrasher as to this evidence brought out on cross-examination. He is incompetent to testify as to any transactions or communications had with the parties deceased, under whom defendants claim title, and otherwise as to such transactions his evidence is mere hearsay.

The first matter of inquiry that suggests itself is as to the effect of the deed of Daniel Stoner, Matilda Stoner, and Letitia S. Buford to L. C. Thrasher. Daniel Stoner was the trustee holding the legal title to the property in controversy. Besides, he was entitled to an interest by way of appointment; and under the trust, if so directed by Matilda Stoner, their daughters being of age and married, he had the right to convey the property to either of them. Under such circumstances, the trustee and the beneficiaries, with the exception of Mrs. Thrasher, unite in changing the character of the trust estate from realty into a personal fund of five thousand five hundred dollars, one thousand dollars whereof is donated to Mrs. Thrasher, while the remaining four thousand five hundred dollars goes into the hands of the trustee and beneficiary grantee, Mrs. Stoner, who together have the full power of disposal thereof to one or both of these adult married daughters. Where trustees convert a trust property, the adult *cestui que* trust has a right to confirm the conversion, and accept the fund in its converted form, or repudiate it and take the original property. But he cannot do both. He must make an election. And his acceptance of the property in a converted form estops him from afterwards demanding the original property. While the deed might be void as a conveyance, it is an evidential fact showing her acquiescence in the transformation of the trust property, which,

taken in connection with the evidence that she received a greater benefit from the transformed property than she was entitled to in the original, estops those claiming under her from a recovery of the original property. In other words, during her adult age and marriage, the trustee, by direction of Mrs. Stoner, in whom was lodged the power by the terms of the trust, instead of giving Mrs. Buford the land, or a part thereof, as he was authorized to do by the instrument creating the trust, with her written assent and approval, sold the trust property, and invested for her benefit the proceeds thereof. Now, having gotten these proceeds, her children, on pure legal technicalities, want also the original property. They insist, because this Court, in the case of *Thrasher v. Ballard*, above, held, as the facts were then presented, the will of Mrs. Stoner invalid to pass the title to the property, and that it descended to Mrs. Thrasher and Mrs. Buford in moieties, that this determination is *res adjudicata*. In that case the Court only held that Mrs. Thrasher was not entitled to the Buford moiety, but did not undertake to determine Mrs. Buford's rights. She was dead, and her heirs were not parties to the suit; and it was not a binding adjudication as to them, and therefore could not be as to the defendants, who in part claim through her deed.

The validity of her deed, however, is questioned. It is shown in evidence that her husband deserted her in 1859, and never lived with her afterwards. At the time of the execution of the deed she was living in Wythe County, Va., while he lived in Missouri, where he remarried,—whether with or without a divorce is not known, although the witness did not know of a divorce. Mrs. Buford, learning of his remarriage, also remarried. “At the common-law, if the husband had abjured the realm, or was an alien residing continuously abroad, these circumstances invested the wife with the protection and powers incident to a *feme sole*.” And the same rule has been extended and applied when the husband resided without the state of the wife's residence, he having deserted her. *Abbot v. Bayley*, 6 Pick. 89; *Gregory v. Pierce*, 4 Metc. (Mass.) 478; *Rose v. Bates*, 12 Mo. 30; *Gallaher v. Delargy*, 57 Mo. 29; *Rhea v. Rhenner*, 1 Pet. 105; *Gregory v. Paul*, 15 Mass. 31; *Cornwall v. Hoyt*, 7 Conn. 427; *Arthur v.*

Broadnax, 3 Ala. 557; *Roland v. Logan*, 18 Ala. 307. In *Starrett v. Wynn*, 17 Serg. & R. 130, the rule of the common-law is stated to be that "if a husband deserts his wife, and ceases to perform his marital duties, the acquisitions of property made by the wife during such desertion are separate property, and that she may dispose of such property by will or otherwise." See, also, *Love v. Moynahan*, 16 Ill. 277. It being simply just to the wife that, her husband having deserted her, and gone beyond the limits of the state, with no intention of returning, she, being thus deprived of her marital rights, should be allowed to manage and dispose of her property as though she were a *feme sole*; otherwise her property would be indefinitely tied up, without benefit to herself or others. In some states, because the statute so provides, a married woman separated from her husband cannot make a good deed for her real estate, for the reason that her husband does not join with her. *Beckman v. Stanley*, 8 Nev. 257; *MacLay v. Love*, 25 Cal. 367; *Leonard v. Townsend*, 26 Cal. 446. The common-law, however, was in full force in this state at the time of Mrs. Buford's conveyance, and the statute law in no wise affected it, except to provide the effect of a married woman's deed when properly acknowledged; and, when the so-called "Married Woman's Law" was adopted into the Code of 1868, special provision was made therein for the conveyance of a wife's property when living separate and apart from her husband. Mrs. Buford executed the deed as though she were a *feme sole*. Her only interest affected thereby was a remote, contingent right, which could be released or conveyed by deed, under section 5, chapter 116, Code Va. And, whether sufficient as a conveyance or not, it would operate as an estoppel in favor of a purchaser in good faith, fully complying with the terms of purchase. If good enough to give her the benefit of the purchase money without restitution, it should be regarded as good enough to bar her heirs from questioning the legality of the appointment afterwards made by Mrs. Stoner, who undoubtedly made it believing at the time that Mrs. Buford had already received full consideration for, and parted with, all her interest in such appointment. In the case of *Rosenthal v. Mayhugh*, 33 Ohio St. 155, it was held that a deed made by a deserted wife and her

children, in the absence of the husband, for his property, was sufficient to bar the wife's dower in said property, which was afterwards recovered by the returned husband, and of which he died seised. And in the case of *Hart v. Gregg*, 32 Ohio St. 502, it was held that a general warranty deed made by an heir apparent for his expectancy, while void as a conveyance, as being for a mere possibility not coupled with an interest, would act as an estoppel in favor of a purchaser for value in possession. Being binding as to Mrs. Buford, it would be binding as to her heirs, as though it were an advancement made. *Coffman v. Coffman*, 41 W. Va. 8 (23 S. E. 523).

But the plaintiff does not claim as an heir of Mrs. Buford, but as heir of Matilda Stoner, insisting that Mrs. Buford died before Mrs. Stoner, and yet he pleads the decision in the case of *Thrasher v. Ballard* as *res adjudicata*. That decision was reached at the instance of those claiming under Mrs. Buford, on the theory that she was alive at the date of the death of Mrs. Stoner, and that for this reason alone she was equally interested in the appointment. The plaintiff now insists that the adjudication of the court is *res adjudicata*, but not as to the facts on which it is founded, and that he is entitled to the benefit thereof, but has a right to show that the main fact on which it is predicated was untrue, and that for this reason he is entitled to the controverted property by virtue of the adjudication, yet in opposition to such fact. In other words, he has the right to assert that Mrs. Buford was dead at the time of an adjudication in her favor, and that the determination was void as to her, but operated in favor of plaintiff's title derived from another source, and that, while defendants are estopped by the adjudication, plaintiff is not, only in so far as it suits him. The plaintiff, in relying on this estoppel, is also estopped from asserting any facts to the contrary of that on which it is founded. He is thus estopped from denying that Mrs. Buford was alive at the death of Mrs. Stoner. Hence, if he relies on the death of Mrs. Buford before Mrs. Stoner, he cannot rely on the adjudication made on a contrary showing as *res adjudicata*. This, then, would leave the question open, as between the parties to this suit, as to whether the will of Mrs. Stoner is void. The former adverse decision

was based on the apparent facts which are now made to appear plainly and admittedly to the contrary: (1) Mrs. Stoner's death before Mrs. Buford's; (2) Mrs. Buford's residence with her husband at the time she joined in the deed to L. C. Thrasher; (3) that she had received no portion of the property in the trust; (4) that the appointment was made without her knowledge or consent. If Mrs. Buford was aware of the appointment, and assented thereto, and received her just portion of the property, it does not matter when the appointment is held to have been consummated,—whether at the date of the will, or at the death of Mrs. Stoner, although the latter must be conceded to be the proper legal time. It is plain to be seen that, when Mr. and Mrs. Stoner and Mrs. Buford joined in the deed to L. C. Thrasher, their object was to carry out that portion of the trust which provided, "If any of the children of the said Daniel and Matilda, or any which they may hereafter have, shall marry or arrive at age, that the said William Nossinger shall give to such child or children such part of the property aforesaid as the said Matilda shall direct."

The property was more than she wanted to give to either or both the children. That they might give a portion to each, they sold it for a fair consideration to L. C. Thrasher, husband of Mrs. Thrasher, and permitted him to retain one thousand dollars as the portion of his wife, and out of the residue of the purchase money provided Mrs. Buford a portion. But, Thrasher failing, the land was sold to pay the unpaid balance of the purchase money, and thus Mrs. Thrasher was deprived of her portion; and she not having joined in the deed, and not being bound thereby in any way shown in the record, Mrs. Stoner executed the appointment by will, thus securing to her such rights as she might have in the land by reason of not uniting in and being bound by the deed, which afterwards, owing to the peculiar phase the facts assumed, was adjudicated to be a one-half undivided interest by inheritance. From these circumstances it is clear that Mrs. Buford, having received her portion, was aware of and assented to the appointment made by Mrs. Stoner; and this is made plainer from the appearance of the names of H. D. C. Buford and N. W. Buford as witnesses to Mrs. Stoner's will, who are now

claiming the land in this suit as the sons of Mrs. Buford, and the heirs of Mrs. Stoner. Mrs. Buford was not a forgotten child, and hence she could not complain of this appointment made to Mrs. Thrasher as invalid if she were living. Much less can her sons, since their mother died before it became effective. The judgment is therefore affirmed.

Affirmed.

CHARLESTON.

KLINKLER v. WHEELING STEEL & IRON Co.

Submitted February 6, 1897—Decided March 31, 1897.

1. *APPEAL—Record—Bill of Exceptions.*

When a bill of exceptions is taken after all the evidence has been submitted, and it purports to set out all the evidence, the evidence set out in this bill of exceptions may be looked to in considering the questions raised in another bill of exceptions taken in the progress of the trial. *Hall v. Hall*, 12 W. Va. 2. (p. 221.)

43	219
45	263
43	219
48	19
48	610
48	612

43	219
51	545

43	219
64	314

2. *NEGLIGENCE—Question for Court.*

When a given state of facts is such that reasonable men may differ upon the question whether there was negligence or not, the determination of the matter is for the jury. But when the facts are such that all reasonable men must draw from them the same conclusion,—when there is no room for two reasonable opinions about it,—then it becomes a question of law for the court. *Raines v. Railway Co.*, 39 W. Va. 50, syllabus 2 and 3. (p. 225.)

3. *EVIDENCE—Excluding Evidence From Jury.*

When the evidence is so clearly deficient as to give no support to a verdict for plaintiff, if so rendered, the court should exclude the evidence from the jury. (p. 226.)

Error to Circuit Court, Ohio county.

Action by Albert Klinkler against the Wheeling Steel & Iron Company. Judgment for defendant, and plaintiff brings error.

Affirmed.

DOVENER & CONIFF, for plaintiff in error.

W. P. HUBBARD, for defendant in error.

McWHORTER, JUDGE :

Albert Klinkler instituted his action of trespass on the case in the Circuit Court of Ohio county September 19, 1893, against the Wheeling Steel & Iron Company, alleging injuries to the person of the plaintiff as the result of carelessness and negligence on the part of defendant company. Demurrer to the declaration was sustained, and the case remanded to rules with leave to plaintiff to amend, and an amended declaration was filed, to which, also, defendant demurred, which demurrer was over-ruled, and on the 19th day of December, 1894, defendant pleaded not guilty, and issue was thereon joined, and a jury impaneled, and before the plaintiff's evidence was all in he asked leave to further amend his declaration, which leave was granted, and plaintiff filed his declaration as amended; and, all the evidence adduced by the plaintiff having been fully heard, and the plaintiff having rested his case, the defendant, without offering any evidence, moved the court to exclude the evidence from the consideration of the jury, to the granting of which motion the plaintiff objected, and on argument and consideration the court sustained the motion, and plaintiff excepted. Thereupon the jury returned a verdict for the defendant, and plaintiff moved the court to set aside said verdict and grant him a new trial, which motion was set for hearing on December 29, 1894, on which last mentioned day said motion was argued and over-ruled by the court, to which plaintiff excepted, and the court proceeded to render judgment upon said verdict.

The plaintiff took four bills of exception, which were duly signed by the judge, and made part of the record. The first was to the ruling of the court in excluding the evidence from the jury and relieving the jury from the consideration thereof. This bill of exceptions No. 1 failed to certify the evidence so excluded. The second bill of exceptions was taken to the over-ruling by the court of the motion of the plaintiff, made after the rendering of the verdict, to set aside the verdict and grant him a new trial of the cause, and the plaintiff also asked the court to certify in this bill of exceptions No. 2 all the evidence introduced in said cause, which was done. The bill of exceptions No. 3 was to the ruling of the court in sustaining the defendant's objection to two certain questions asked by

plaintiff of witness J. M. Vance. And bill of exceptions No. 4 was taken to the ruling of the court sustaining a like objection to a question by plaintiff asked of witness R. T. Devries.

It is contended by defendant that, the bill of exceptions No. 1, taken to the action of the court in excluding the evidence of the plaintiff from the jury, not setting forth, either directly or by reference to any other part of the record, the evidence which is said to have been excluded, this Court, of course, can not see from this bill of exceptions that the court below erred, and it must be assumed that its judgment was right; and it is further contended that the Court cannot refer to the second or any other bill of exceptions for the purpose of seeing what evidence is referred to, such other bill not being referred to in bill No. 1,—and cites the case of *Zumbro v. Stump*, 38 W. Va. 334 (18 S. E. 443), in support of the position, which says (quoting from 1 Bart. Law Prac. p. 659): “The facts stated in first bill of exceptions, however, cannot be noticed by an appellate court in considering another, unless the first bill is referred to in the second, and adopted as part of it,”—and cites *Crarford v. Jarrett's Adm'r*, 2 Leigh 639; *Perkins' Adm'r v. Harkins' Adm'r*, 9 Grat. 649; *Brooke v. Young*, 3 Rand. 106. It will be found in some of the cases here cited, notably that of 9 Grat., and also in *Hall v. Hall*, 12 W. Va. 21, and set out in syllabus 2 of that case, an exception is made to the rule, as when a bill of exceptions is taken after all the evidence has been submitted to the jury, and it purports to set out all the evidence, the evidence set out in this bill of exceptions may be looked to in considering the question raised in another bill of exceptions taken in the progress of the trial. So that we see no difficulty in the way of considering the evidence certified in bill of exceptions No. 2 to ascertain whether the court erred in excluding the evidence from the jury.

Plaintiff was conductor on the transfer train to make connection between Wheeling and Benwood on passenger trains to and from Wheeling. On the 8th of April, 1893, plaintiff says in his testimony, they took charge of the train from Wheeling, and took the connection to Benwood, and then made connection there with the regular train No.

47 from Grafton, and brought her up to the Baltimore & Ohio shop at Twenty-seventh street, Wheeling, where the shops were then located, and then took the train from the regular engine from Grafton, and put on engine 62 to get passenger train to the depot. The train was pushed up in front of the engine on the main and eastern track, plaintiff standing on front platform furthest from the engine, the proper place for conductor when train was being pushed. With plaintiff, on front end of car, were four other men. About Twenty-sixth street are situated the works of the defendant, on the east side of the Baltimore & Ohio tracks, from which works the defendant's railroad runs across the several tracks of the Baltimore & Ohio to the track of the Pittsburg, Wheeling & Kentucky Railroad, operated by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. At the time of the accident the next track of the Baltimore & Ohio on west of main track was filled with freight cars of the Baltimore & Ohio Company, which obstructed the view between the main track and the cross track from the point at which the train was being pushed. The engine of defendant, called a "dinkie," was coming from the Pittsburg, Wheeling & Kentucky track towards the iron works with two freight cars. On the engine were J. C. Malony, engineer and fireman, and — Householder, brakeman. Before reaching the second track, on which the freight cars were standing, defendant's engine stopped, and Householder went forward past the freight cars, and says he looked down and saw a train of coaches, and, supposing they were switching out of the shop and stopped, he (Householder) waved the defendant's engineer ahead, but he was a little slow in starting, and he (Householder) started back,—stepped on the foot-board on front of the engine as she came up. Plaintiff says he was about forty feet away when he saw Householder wave him out. Plaintiff's train was moving "about 20 miles an hour." He afterwards, however, corrects this, and says he was going at the rates of eight or ten miles an hour. Another witness, James Young, puts it at six miles per hour that plaintiff's train was moving at time of accident. Plaintiff says he did not know what Householder was waving for.

It is provided in section 61, chapter 54, Code, that "when

the tracks of two railroads cross each other, or in any way connect at a common grade, the crossings shall be made and kept in repair and watchman maintained thereat at the joint expense of the companies owning the tracks, and all trains or engines passing over such tracks shall come to a full stop not nearer than two hundred feet nor farther than eight hundred feet from the crossing, and shall not cross until signaled so to do by the watchman, nor until the way is clear." In answer to the question, "Did you stop on account of this crossing?" plaintiff answered: "Did I stop? No, sir. I stopped on the crossing because I couldn't help myself, when the accident occurred." "Before that had you stopped?" He replied: "We were coming to the depot on regular time, and we was coming at our usual rate. Never had any orders to stop at that crossing." Rule 37 of the Baltimore & Ohio Company, which plaintiff said was in force, is as follows: "Trains are run under the charge of the conductors thereof, and their directions relative to the management of trains will be observed, except in cases where such directions may be in violation of the rules of this company or of safety, in which cases enginemen will call the attention of conductors to the fact, as understood by them, and decline compliance. The same also holds good in all cases of doubt. Enginemen, as well as conductors, must in every case absolutely know that they are entitled to the track before proceeding. Conductors and enginemen will in all cases be held equally responsible." Also rule 80, as follows: "Pushing cars ahead of the engine is positively forbidden, except in cases of helpers on grades, or when impossible to avoid it. In the latter case speed must not exceed four miles per hour, with man on lookout in front car in sight of engineman." Also rule 61, as follows: "Whenever, in the absence of special orders to do so, it becomes necessary to back a train in the opposite direction from that in which it is expected to move, it must be done with great care, and at a rate of speed not exceeding four miles per hour, keeping a flagman constantly not less than 1,500 yards in advance of the rear of train to warn any train that may be approaching. In all cases of backing a train, a competent man, the conductor if possible, must be stationed at the rear of last car to watch for signals or

obstructions, and to signal the engine and stop train whenever necessary. If a passenger train, he must hold bell cord in his hand in readiness to sound the engineman's alarm bell." Also rule 77, which is intended to carry out the statutory provision: "All engines and trains must come to a full stop not less than two hundred feet nor more than eight hundred feet from each railroad crossing, and not proceed until the crossing signal indicates their right to do so. Where there is no such signal, the engineman will send the fireman or brakeman ahead to ascertain that the way is clear, and to flag the train over the crossing." And in order to secure the safety and efficiency of its employes the Baltimore & Ohio Company had in force the following rules, Nos. 121 and 76, respectively: "The company does not wish or expect its employes to incur any risks whatsoever from which, by the exercise of their own judgment and by personal care, they can protect themselves, but enjoins upon them to take time in all cases to do their duty in safety, whether they may be at the time acting under the orders of their superiors or otherwise." "All employes must familiarize themselves with the general and special rules pertaining to their respective positions. If in doubt as to the meaning of any rule or special order, application must be made at once to proper authority for an explanation. Ignorance cannot be accepted as an excuse for neglect or omission of duty."

These rules are reasonable, and provided by the railroad company as well for the safety of its passengers and employes as for that of its own property and interests, and it is the imperative duty of all employes, especially those of the grade of conductors and engineers, whose responsibilities are so great, to thoroughly acquaint themselves with the rules, and to strictly observe them in the performance of their duties. Plaintiff was conductor in charge of this train, and as such it was not only his duty to obey the rules himself, but to see that all employes on the train did the same. On the contrary, he violated directly many of the rules of the company, including statutory rules, with such recklessness as is seldom found, not only endangering the lives of the passengers in his charge and the destruction of the property of his employer, but greatly endangering his own life. Plaintiff was in the position on

the train it was proper for him to occupy in pushing a train, which is about all that can be said for him. He failed to stop before the crossing, to have his hand upon the cord to sound the engineer's alarm bell and apply the air brake, to send a watchman ahead or to await the signal to proceed. Just as the collision was about to take place, plaintiff says he thought the best thing he could do to save the passengers was to stop the train by putting the air on, which he did by a handle underneath the car,—that he reached down underneath the car to get it and “put on the air just as he hit us.” So, instead of using the more certain means of putting on the air by pulling the rope, he chose the unusual method of reaching under the car, which threw him between the colliding “dinkey” and car, whereby his head was badly injured. The former mode was the one provided, safe and effective; the latter, never intended to be so used, and under the circumstances most dangerous. If plaintiff had used ordinary care and precaution, this unfortunate occurrence would not have been brought about, by which he is left a mere wreck of a man perhaps for the rest of his life.

It is contended that the Baltimore & Ohio train on the main track had the right of way, and that, “although the plaintiff be guilty of negligence, which may have contributed to the injury, yet if the defendant or its servant knew of that negligence, or might have known of it by the use of care and diligence, and could then have prevented the injury to the plaintiff, then the plaintiff's negligence will not defeat him, the defendant's negligence being the proximate cause of the injury.” It is true plaintiff's train had the right of way, but this fact did not authorize him to violate the law and the rules of the company made for his guidance and control, and the observing of which—indeed, of almost any one of which—would have prevented his injury. Who can believe, for a moment, from the evidence adduced by plaintiff in this case, that “his injury would have occurred from the defendant's negligence just the same if the plaintiff had been in no wise negligent,” as in *Carrico v. Railway Co.*, 39 W. Va. 87 (19 S. E. 571). “When a given state of facts is such that reasonable men may differ upon the question whether there was negligence or not, the determination of the matter is for the jury.”

Raines v. Railway Co., 39 W. Va. 50, (19 S. E. 565, syl. 2). "But when the facts are such that all reasonable men must draw from them the same conclusion,—when there is no room for two reasonable opinions about it,—then it becomes a question of law for the court." *Id.* syl. 3. I am a firm believer in the right of trial by jury, and jealous of any encroachments on that right, and have feared sometimes that the circuit courts infringe upon the province of the jury; but in a case where the evidence is so clearly deficient as to give no support to a verdict for plaintiff if so rendered, there can be but one course to pursue, and that is for the court to exclude the evidence from the jury, and end the case, and in this case the court did not err in so excluding the evidence.

As to the third and fourth bills of exceptions to the action of the court in sustaining objections to certain questions, it matters not what the answers may have been. The result could not have been affected by them. For the reasons stated, as much as my sympathies go out to the unfortunate plaintiff, the judgment of the circuit court must be affirmed.

Affirmed.

CHARLESTON.

MCGLAUGHLIN *et al.* v. MCGLAUGHLIN'S LEGATEES *et al.*

Submitted January 27, 1897—Decided March 31, 1897.

1. EXECUTORS—*Legacies—Refunding Bond—Devastavit.*

An executor who exhausts the personal estate of his testator in paying specific legacies without taking a refunding bond, will, as to the creditors of said testator, be considered as having committed a *devastavit*, whether he had notice of the debts due such creditors at the time he paid such legacies or not. (p. 239.)

2. EXECUTORS—*Death of Executor—Parties.*

Where an executor has died after partially administering the estate of his decedent, and a suit is brought to recover a claim against said estate simply, no defendant is necessary, except the personal representative. (p. 240.)

48	226
47	23
48	226
49	204
49	209
50	180

3 EXECUTORS—*Executor's Accounts—Commissions.*

An executor who has failed to comply with the requirements of section 7 of chapter 87 of the Code, so far as the same requires him to lay his account of receipts for any year, within six months after its expiration, before a commissioner, shall have no compensation for his services during said year. (p. 241.)

4. WILLS—*Wife—Election.*

When any provision for a wife is made in her husband's will, unless, within one year from the time of the admission of said will to probate, she renounces such provision, as provided in section 11 of chapter 78 of the Code, she shall have no more of such estate than is given her by the will. (p. 242.)

5. EXECUTORS—*Creditors' Suits—Refunding Bond.*

An executor cannot defend himself against the suit of a creditor by showing that before he had notice of the plaintiff's demand he paid over the assets to the legatees of the testator, unless he took and filed a refunding bond as required by law. (p. 239.)

6. WILLS—*Legacies—Real Estate.*

A will which contains the following clause: "I desire that all my just debts be paid out of my estate as soon after my decease as convenient," does not thereby create a charge upon the testator's real estate. Real estate is not chargeable with pecuniary legacies unless the intention so to charge is expressed in the will, or such intention appears by implication. (p. 239.)

Appeal from Circuit Court, Pocahontas county.

Petition by Hugh P. McGlaughlin and others against David McGlaughlin, executor of the will of Hugh McGlaughlin, deceased, and others. From the decree rendered, Uriah Hevener, administrator of the estate of David McGlaughlin, deceased, appeals.

Modified.

H. S. RUCKER, for appellant.

R. S. TURK, for appellees.

ENGLISH, PRESIDENT:

This was a suit in equity brought by Hugh P. McGlaughlin, Muscoe H. Corbett, and William Skeen against David McGlaughlin, executor of the last will and testament of Hugh McGlaughlin, deceased, Elizabeth McGlaughlin, his widow, and others, grandchildren, devisees, and legatees

of said Hugh McGlaughlin, deceased, in the Circuit Court of Pocahontas county. The plaintiffs in their bill allege that on the 8th day of March, 1866, said Hugh McGlaughlin made and published his last will and testament, which will was admitted to probate on the 14th day of May in the same year, and proceeds to set forth in detail the various bequests and devises contained in said will; that the plaintiff, Muscoe H. Corbett is the assignee of one hundred and twenty-five dollars bequeathed to John A. McGlaughlin, which was assigned to him on the 22nd day of March, 1878; that David McGlaughlin, the executor named in said will, qualified as such some time in the year 1866; that on the 6th day of June, 1868, said executor made an *ex parte* settlement of his accounts as such, and was found to be indebted to the estate in the sum of forty-five dollars and eighty-seven cents principal and three dollars and sixty-one cents interest; that on the 1st of June, 1873, said executor made another *ex parte* settlement of his account, and was found due the estate forty-three dollars and eighty-seven cents, and on the 18th of February, 1878, he made another settlement, and was found due the estate forty-three dollars and eighty-nine cents principal, and thirteen dollars and forty-six cents interest, and on the 16th of October, 1883, he made another settlement, by which he was found indebted to the estate seventy-one dollars and twenty-five cents, which he paid on debts due the complainants McGlaughlin and Corbett, and nothing was left to pay any other debts; that said testator was indebted to complainants McGlaughlin and Corbett, and that on the 5th day of September, 1867, the complainant Hugh P. McGlaughlin obtained a judgment against said executor for one hundred dollars with interest from the 15th day of September, 1866, till paid, and the costs, upon which judgment the executor made some payments, but leaving a balance unpaid; that the plaintiff Muscoe H. Corbett obtained a judgment on the same day for the same amount, with like interest and costs, upon which judgments some payments have been made, but leaving a balance still due and unpaid thereon; that the plaintiff William Skeen obtained a judgment upon a bond executed for borrowed money against the executor on the 2d day of May, 1877, for three hundred and fifty-seven

dollars [and fifty-eight cents, with interest from that date till paid, and nine dollars and ninety cents costs, upon which judgment said executor failed to make any payment, and the whole amount is still due and unpaid, copies of which judgments were exhibited; that the testator's widow still lives, and was made a party to the bill; and that John E. McGlaughlin and Margaret Hogsett were infants. It is further alleged that the executor did not sell any of the personal property willed to the widow or to the plaintiffs McGlaughlin and Corbett, but handed it over to the legatees, and as a consequence there is a deficiency of assets for the payment of debts, and a resort must be had to the realty, if the personalty was not responsible. Complainants ask the court to construe testator's will in the light of the law, and as, in the event of a deficiency of assets, testator failed to designate what property was to be sold for payment of debts, that the court may judicially settle the question, and render such decree as may be just and equitable, and enable them to collect their debts; that a settlement of the accounts of the executor before a commissioner of the court might be decreed, creditors (if any other than complainants) convened, and required to prove their debts, and an account of debts be taken and reported by the commissioner, an account of the real estate of which testator died seised, the value and rental value thereof taken and reported; that, in the event the rents will pay complainants' debts within five years, said lands be decreed to be rented for that purpose, and, if said land will not rent for a sum sufficient to pay within five years, that the lands liable for the payment of complainants' debts be decreed to be sold for the payment of the same.

Thomas H. McGlaughlin and others, grandchildren of the testator, demurred to the plaintiff's bill, and for answer say that by the terms of said testator's will they are to receive equally the proceeds of the sale of said testator's lands when sold according to the terms of the will; that they know nothing of the pretended debts alleged to be due the plaintiffs by or from their grandfather's estate, but, if any debts ever existed, they are now barred by the statute of limitations, and they rely upon and plead the said statute to all three of said pretended debts, and deny their validity. They further allege that the judg-

ments set forth against the executor in the plaintiff's bill are not *prima facie* evidence of the justness of any claim on the part of the plaintiffs, or either of them, against respondents, and that such judgments against the executor do not and have not stopped the statute of limitations as against respondents; that the claims of H. P. McGlaughlin and M. H. Corbett are identical, and are open accounts, dated in 1866, for work done on the decedent's farm, and are for one hundred dollars each, copies of which accounts are exhibited with said answer; that on these accounts actions were instituted on the 7th day of February, 1867, against the executor, and judgment obtained thereon against said executor in their favor on the 5th day of September, 1867; that the judgment of the plaintiff William Skeen purports to have been obtained on a writing obligatory of Hugh McGlaughlin to him for one hundred and seventy-five dollars, dated and due the 3d day of February, 1854, and an attested copy of the declaration of said Skeen filed against the executor was exhibited with said answer; that said judgment was not *prima facie* evidence of the justness of said pretended debt as against respondents, and did not stop the statute of limitations as to them, and said obligation, if it ever had any legal existence, was long since barred by the statute as to them, and they expressly pleaded and relied upon said statute.

And they further allege that it appears from the appraisal bill that Hugh McGlaughlin left a large amount of personal property which should have been applied in payment of his debts, and they pray the dismissal of the plaintiffs' suit. The defendants also filed an amended answer, in which they allege that personal property of the value of eight hundred and ninety-seven dollars and seventy-five cents came into the hands of said David McGlaughlin, the executor, of which amount of property he only sold four hundred and two dollars worth, and that he collected various bonds, as shown by his settlement, amounting to nearly or quite eight hundred dollars more, naming the parties from whom said collections were made, some of which money he paid out upon a number of small claims presented to him by various persons, as appears from the various settlements made by said executor of his accounts, none of which claims were ever proven in such manner as

made it proper and right for said executor to pay them; that the amount of personalty which came into the hands of said executor was amply sufficient to have more than paid all of the just debts of the testator and the pretended claims of plaintiffs, but instead of so doing he paid it out to the devisees and legatees and the testator's widow; that he took no refunding bonds from the legatees, and has made himself liable to the extent of the personal property which came into his hands, and that it would be inequitable and unjust to shift the responsibility from the personal to the real estate, inasmuch as the said executor is solvent, and the debts should be charged to him, since he has wasted and misapplied the fund liable for said debts; and that Hugh McGlaughlin and M. H. Corbett can not claim anything on their unjust demands because they have received the very property which should go to the payment of just debts. David McGlaughlin, executor of the last will and testament of Hugh McGlaughlin, deceased, also answered the plaintiff's bill, in which answer he claims that he made his proper settlements, and accounted for and paid out properly all assets which came into his hands as such executor; that no considerable amount of personalty came into his hands, the same having been disposed of by the testator in specific legacies, which were turned over to the parties entitled, he being advised that, the testator having charged the land with the payment of his debts, the same would become assets in the hands of the executor for payment of said debts, and he avers that the remainder, after the life estate of the widow Elizabeth McGlaughlin, and the two-years possession of the land as disposed of in testator's will, should be regarded by a court of equity as assets in the hands of the executor, and as such should be sold for the payment of the debts in the plaintiff's bill mentioned. He claims that he has properly paid out all funds that came into his hands as executor, and has made proper settlements before commissioners appointed by the court; that these settlements were approved, confirmed, and ordered to be recorded by the court; and prays that the remainder in Hugh McGlaughlin's home place be sold, and the proceeds applied to the payment of the unpaid debts, and says there was nothing in the bill or any part of the proceedings of

the cause surcharging and falsifying the settlements made by him as executor, and that, in the absence of said allegations, said accounts and *ex parte* settlements are presumed correct.

Now, the testator departed this life between March and May, 1866, and the bill in this cause was not filed until May, 1885, about nineteen years thereafter. David McGlaughlin, the executor, qualified as such between March and May, 1866, and made several *ex parte* settlements, which were duly confirmed by the court. The defendants demurred to the plaintiffs' bill, and relied on the statute of limitations, and we have seen, by the exhibits filed with their answer, showed that the claims upon which the judgments asserted in their bill were founded were not of such character as to prevent them from being barred by the statute of limitations. Without passing upon the demurrer and the plea of the statute of limitations, the court referred the cause to a commissioner, who returned a report, which was not confirmed, and exceptions were indorsed thereon by the defendants; and the cause was referred to another commissioner, who filed a report, which was never confirmed. The defendants then filed an amended answer, surcharging and falsifying the *ex parte* settlements of the executor. If the cause had terminated at this point, I am of opinion the plaintiffs' bill should have been dismissed, as the claims upon which the bill was predicated were clearly barred by the statute of limitations, and the demurrer should have been sustained. On the 7th day of April, 1886, however, H. M. Lockridge filed his petition in said cause, representing that on the 30th day of December, 1852, George B. Moffett, as principal, with E. Campbell, Hugh McGlaughlin, and James T. Lockridge, sureties, executed their bond to William Skeen, executor of Henry M. Moffett, deceased, for the sum of one thousand and five hundred dollars; that George B. Moffett and E. Campbell were utterly insolvent, and that said Hugh McGlaughlin was dead, and said Skeen instituted a suit on said bond in the circuit court of Pocahontas county, and in June, 1869, a judgment was rendered against said George B. Moffett and James T. Lockridge, the said E. Campbell being then a non-resident of the state and insolvent, and said Hugh McGlaughlin being dead;

that a portion of said judgment by said George B. Moffett was paid to said Skeen, executor, *etc.*, and the residue thereof, to wit, two thousand seven hundred and forty-six dollars and eighty cents, was paid on the 6th day of January, 1886, by said James T. Lockridge assuerty to your petitioner H. M. Lockridge, who was assignee of Isaac Moore, who was assignee of said William Skeen; that one-half of this debt, to wit, one thousand three hundred and seventy-three dollars and forty cents, as of January 6, 1886, was due from the estate of said Hugh McGlaughlin to said James T. Lockridge or his assignees; that seven-tenths of said sum of one thousand three hundred and seventy-three dollars and forty cents is now due to your petitioner H. M. Lockridge, the same having been regularly assigned to him, and the residue, to wit, three-tenths, was due your petitioner Lanty Lockridge, the same having been regularly assigned to him.

The petitioners then further represent that a creditors' bill in the name of H. P. McGlaughlin and others (being the original of which we have been speaking), the object of which was to convene the creditors of said Hugh McGlaughlin, ascertain his debts, and sell his lands to satisfy the same, was then pending in the circuit court of said county, and the petitioners had had their claim reported by the commissioner in said cause, and they filed this their petition in said cause, and pray that they may be made parties thereto, designating those they desire made defendants to their petition, consisting of the children, grandchildren, devisees, and legatees of said Hugh McGlaughlin, and praying that the land of said Hugh McGlaughlin might be sold to satisfy his debts, and that in any decree which might be rendered in said cause their interests might be fully protected.

The defendants filed their answer to said petition, attacking the settlements made by the executor of Hugh McGlaughlin, deceased, seeking to surcharge and falsify the same, pointing out various errors which they claim to exist therein, and insisting that the personal property which came into the hands of said executor, and which was the primary fund for the payment of debts, should be charged against him, in so far as he has paid the same in legacies, in violation of law, and in so far as he has not been charged therewith.

The petitioners further allege that, if a proper accounting and handling of the estate had been made by said executor, there would have been ample funds in his hands to have paid off all the debts claimed to be due from the estate, even if the supposed claim of the petitioners was valid and subsisting. They deny the existence of any claims or liability on the part of Hugh McGaughlin's estate to James T. Lockridge or his assignees, H. M. and Lanty Lockridge, and allege that, if there ever might have been such liability, the claim has long since been barred by the statute of limitations. They require the fullest proof thereof, and allege that Hugh McGaughlin died in the spring of 1866, and his executor qualified a short time thereafter, making nearly twenty years that had elapsed since the qualification of said executor; and that neither James T. Lockridge nor his assignees can occupy any better or higher position as to this debt than William Skeen, the original obligee, and as he could, under no circumstances, collect it, or any part thereof, from the estate of Hugh McGaughlin, a *fortiori* cannot Lockridge's assignees.

They deny that George B. Moffett, the principal in said bond, was insolvent, and allege that he was the owner of a life estate in a large and valuable tract of land situated in said county, and that said life estate is still liable for the payment of said debt; that the said lands are very fertile, and if rented out would in a few years pay off said debt, and that it was the duty of J. T. Lockridge, instead of paying off said debt due from George B. Moffett, the principal, to have required said Skeen or his assignees to have first rented these lands and exhausted the principal before requiring him to pay the said debt; that the said Lockridge, being in possession of these facts, and failing to avail himself of them, was then estopped from making a co-surety contribute, even if it was right and proper, under the circumstances, to do so. They pray that the accounts of the said David McGaughlin, executor, may be corrected as suggested in said answer; that he be charged with all personal property turned over by him or paid upon legacies; that the life estate of the principal debtor, George B. Moffett, in the lands of his wife, mentioned in said answer, be rented or sold as might seem best to the court,

and the proceeds applied to the repayment to James T. Lockridge or his assignees of the money he, as surety, has paid for said George B. Moffett, and that H. M. Lockridge and Lanty Lockridge be enjoined, and forever prohibited, from further proceeding against the estate of the defendants in the land of Hugh McGlaughlin acquired under said will.

On the 19th day of October, 1866, the cause was referred to L. M. McClintic, one of the commissioners of the court, who made a report in which he found in favor of part of the legatees as to the statute of limitations and the legatee's *devastavit*, finding the executor in debt to the estate one thousand one hundred and forty-three dollars and thirty-one cents. Before this report was finally acted upon it was brought to the attention of the court that David McGlaughlin, executor, *etc.*, was insane, and so much of the decree as was a personal decree against said executor was set aside, and a committee was appointed for said insane person. However, the real estate of Hugh McGlaughlin, deceased, was directed to be rented out. On the 16th of October, 1887, said cause was recommitted to Commissioner McClintic, giving special directions as to Lockridge debt, and said commissioner made his report finding a *devastavit* of one thousand two hundred and eighty-nine dollars and eighty-five cents. Subsequently said Commissioner McClintic made another report, finding the *devastavit*, after crediting certain sums thereon, to be seven hundred and one dollars as of the 18th day of June, 1890, which report was confirmed by decree rendered on the 18th day of October, 1894, fixing the *devastavit* at seven hundred and one dollars, and from the decree confirming said report this appeal was taken.

The principal question we are called on to determine in this case arises upon exceptions to the last report made by Commissioner L. M. McClintic. By said report it will be perceived that said commissioner ascertained the gross sum of said executor's *devastavit* to be one thousand two hundred and sixty-nine dollars and eighty-five cents, which amount was reduced to the sum of seven hundred and one dollars by allowing said executor credit for forty dollars and twenty-eight cents commissions and interest thereon to June, 1890, making ninety-five dollars and eighty-two

cents; also by allowing him credit for the the judgment of H. P. McGlaughlin, with interest to June 18, 1890, amounting to one hundred and sixty-five dollars and ninety-eight cents; also by a judgment of M. H. Corbett, which, with interest to June 18, 1890, amounted to one hundred and sixty-eight dollars and nine cents; and by two hundred dollars, the amount of the estate the widow might have taken at the sale. The legatees, by their attorney, excepted to said report so far as it credited the executor with ninety-five dollars and eighty-two cents commissions, and with said judgments in favor of H. P. McGlaughlin and M. H. Corbett, and with the two hundred dollars which the widow might have claimed at the sale; also as to the special statement made, at the instance of the executor's attorney, finding the amount of William Skeen's judgment. The administrator of David McGlaughlin, deceased, also excepted to said report: (1) Because the specific legacies to H. P. McGlaughlin, M. H. Corbett, and Elizabeth McGlaughlin should have been allowed to David McGlaughlin as a credit upon his indebtedness to Hugh McGlaughlin's estate, because there were no debts then existing upon the payment of which there was not ample means in his hands after paying over said legacies. (2) The judgment of Skeen (if there ever was any such) was a personal judgment against David McGlaughlin, and not against him, to be paid out of his decedent's estate. (3) As a personal judgment against said David McGlaughlin, the same was barred. See copies of judgment and execution by the former report. (4) Said Skeen never presented his claim for allowance against the estate of H. P. McGlaughlin, deceased, although notice was duly published by the executor. (5) The legacy having been paid Elizabeth McGlaughlin, instead of the two hundred dollars allowed her by law if she was deprived of the legacy, the executor should be credited in settlement with the two hundred dollars as of the date at which he paid her the legacy, in all equity. (6) There was no evidence of *devastavit* before the commissioner upon which to base his principal statement or first statement, and it appearing that the executor simply followed the intention of the testator, and his settlements having been regularly made by an *ex parte* commissioner, the special statement should be

adopted and this cause dismissed. (7) The heirs of Hugh McGlaughlin are in no condition to claim a *devastavit*, which is claimed to arise by the executor having paid over specific personal legacies of a perishable nature. Equality between them is equity and they cannot complain.

The only decree complained of in the assignment of errors is the final decree rendered on the 18th day of October, 1894, which heard the cause on the report of Commissioner McClintic filed on the 14th of June, 1890, with the above exceptions indorsed thereon, confirming said report so far as it found the *devastavit* committed by the executor of Hugh McGlaughlin, deceased, to be seven hundred and one dollars, as of the 18th of June, 1890, which sum, with interest thereon to the date of the decree, amounted to eight hundred and thirty-three dollars and twenty-six cents, and appointed a special receiver, who was decreed to recover of the estate of David McGlaughlin, deceased, to be levied of the goods and chattels of said decedent in the hands of his administrator, the sum of eight hundred and thirty-three dollars and twenty-six cents, with interest thereon from the 17th day of October, 1894, till paid, and costs; and said special receiver was thereby empowered to take such legal steps as he might deem necessary, by execution or otherwise, to collect the money aforesaid, directing the same to be brought into court to be disbursed; and in the event the said special receiver should be unable to collect said sum out of the personal estate of the said David McGlaughlin in the hands of, or which should be in the hands of, the administrator of David McGlaughlin, then he might proceed to enforce the collection of said claim against the real estate of said David McGlaughlin in the hands of his heirs.

The first error assigned and relied upon by the appellant administrator of David McGlaughlin, deceased, is as follows: It was error to decree in favor of Hugh McGlaughlin's grandchildren against the estate of the executor, David McGlaughlin, eight hundred and thirty-three dollars and twenty-six cents, based upon a *devastavit* consisting of payments of legacies prematurely to the widow Elizabeth McGlaughlin, M. H. Corbett, and Hugh P. McGlaughlin. The only question arising under this assignment of error is whether the executor, David McGlaugh-

lin, committed a *devastavit* in making the payments mentioned in said assignment of errors. As to what constitutes *devastavit*, 2 Lomax, Ex'rs, p. 457, thus states the law: "An executor or administrator, is subjected by law to liability personally for various acts of misconduct amounting to a violation or neglect of duty, and which is called in law a '*devastavit*' or wasting of the assets. In law a *devastavit* is a mismanagement of the estate and effects of the deceased, in the squandering and misapplying the assets contrary to the trust and confidence reposed in the executors or administrators, for which they shall answer out of their own pockets as far they have or might have had assets of the deceased. * * * It is the general duty of the executor to apply the legal personal assets of the testator to the satisfaction of the creditors before he satisfies any of the legatees." In the same volume (page 208) it is said: "The payment of a legacy before a debt, if the assets afterward prove insufficient, will in many instances involve his personal responsibility to the creditor, and subject his own estate to the charge, it being a *devastavit* to pay or assent to legacies before the payment of debts." On this proposition the law is stated as follows in the case of *Kippen v. Carr's Ex'r*, 4 Munf. 119: "An executor cannot defend himself against the suit of a creditor by showing that before he had notice of the plaintiff's demand he paid over the assets to the legatees of the testator." So, also, in the case of *Cookus v. Peyton's Ex'r*, 1 Grat. 432 (section 4 of the syllabus), it is held that "an administrator paying away the assets of the estate to distributees, without notice of debts or liabilities of his intestate, must account to creditors of the amount so paid away, with interest." Said executor had it in his power, under section 30 of chapter 87 of the Code, to have protected himself and the creditors of said estate by taking a refunding bond. Said section provides that "if any personal representative shall pay any legacy given by the will, or distribute any of the estate of his decedent, and there be filed in said clerk's office a proper refunding bond for what is so paid or distributed, with a security therein sufficient at the time of taking it, such personal representative shall not on account of what is so paid or distributed, be personally liable for any debt or demand against the decedent, whether

it be of record or not, unless within one year from his qualification, or before such payment or distribution, he shall have notice of such debt or demand." And said section proceeds to provide for suits by creditors upon such refunding bond. It was clearly the duty of the executor, under this section of the Code, to have taken a refunding bond, and in this manner to have protected himself and the creditors of said estate. Upon this question see the case of *Lewis v. Overby's Adm'r*, 31 Grat. 602 (point 4 of the syllabus), where it is held that the "executors, having distributed the personal property of a decedent in his possession at his death without taking a refunding bond, are responsible to the creditor, though they knew of no debt due from said decedent."

A material question to consider in this case is whether the debts of the testator were or not made a charge upon the real estate of which he died seised and possessed. The language used by the testator. "I desire that all my just debts be paid out of my estate as soon after my decease as may be convenient," are almost identical with those used in the case of *Garr v. Huffman*, 12 Grat. 628. In that case the testator said: "It is my will and desire that my just debts be paid out of my estate by my executor hereinafter mentioned;" and it was held that the debts were not thereby charged upon the testator's real estate. Neither does it appear in any manner by implication in this case that it was the intention of the testator to charge his land with the payment of his debts, but the contrary seems to have been his intent: because after the death of his wife, and after the two years his nephews Hugh P. McGlaughlin and Muscoe H. Corbett were to have the use of the farm, he directed it to be sold, and that his son John A. McGlaughlin receive one hundred and twenty-five dollars out of the proceeds, his daughter Mary Ann Hogsett receive one hundred dollars of the proceeds, and the remainder thereof be divided between his grandchildren then living. In the case of *Thomas v. Rector*, 23 W. Va. 26 (first point of syllabus), it was held that "real estate is not chargeable with pecuniary legacies unless the intention so to charge is expressed in the will, or such intention appears by implication." The payment of the legacies prematurely to the widow Elizabeth Mc-

Glaughlin and to H. M. Corbett and Hugh McGlaughlin without requiring a refunding bond must be considered as a *devastavit*. The grandchildren were entitled to have the debts paid out of the personalty, and the real estate devised to them protected from the debts of the testator, and for this reason I regard the second assignment of error not well taken.

The third assignment of error claims that it was error to decree affirmative relief against the estate of the defendant David McGlaughlin in favor of his co-defendants, the grandchildren of the testator, upon the pleadings in this cause. This assignment, however, can not be sustained when the answer of said grandchildren, in response to the petition filed by H. M. Lockridge and Lanty Lockridge, is examined and considered, for the reason that the claims of said grandchildren and their contention in this cause are fully pleaded and relied on.

The fourth assignment of error claims that it was error to decree anything against the estate of David McGlaughlin, deceased, without first making his children parties thereto. Upon this question see *Jones v. Reid's Adm'r*, 12 W. Va. 350 (fourth point of the syllabus), where it is said that, "in a suit to recover a claim against an estate simply, no defendant is necessary or proper except the personal representative."

In the fifth assignment of error it was claimed to be error to over-rule the exceptions of the appellants to the report of Commissioner McClintic, and to sustain the exception of the grandchildren thereto. The exceptions indorsed by appellants on said report have already been set forth and considered in this opinion, and, for the reasons above stated, were properly overruled by the court.

The sixth assignment of error, to wit: that "it was error to decree anything in favor of the grandchildren now living, because only those grandchildren living at the date of the death of the testator's widow can take under the terms of the will, and the widow is still living, and the particular fund out of which the legacies of the grandchildren are carved failing, the legacies failed," is sufficiently disposed of by referring to the decree complained of, from which it is manifest that nothing had been decreed thereby in favor of said grandchildren, said decree merely having deter-

mined the amount of the *devastavit* committed by the executor, and directing a special receiver to collect the same, without in any manner indicating how it shall be disbursed.

The seventh assignment of error is, that it was error to declare the payment of the legacy to the widow, H. P. McGlaughlin, and M. H. Corbett a *devastavit* so far as the Lockridge debt was concerned, for there was nothing due from the testator's estate, nor anything known of any such claim, until nearly twenty years after such legacies were paid over by the executor. This assignment of error is met by the case of *Lewis v. Overby's Adm'r*, 31 Grat. 602 (fourth point of syllabus), above quoted, where it is held that the executors, having distributed the personal property of their testator in his possession at his death without taking a refunding bond, are responsible to the creditor for its value, though they knew of no debt due from said testator; and also by the case of *Cookus v. Peyton's Ex'r*, 1 Grat. 432 (fourth point in the syllabus), where it is held that "an administrator paying away the assets of the estate to distributees, without notice of debts or liabilities of his intestate, must account to creditors for the amount so paid away, with interest."

The appellees in their brief make a cross assignment of error, in which they claim that the court erred in the decree complained of in over-ruling their exceptions to Commissioner McClintic's report, which exceptions have been hereinbefore quoted, and in my opinion said exceptions should have been sustained, first, because commissions were improperly allowed to the executor, who had failed to comply with the statute in regard to the settlement of his accounts, which commissions, with the accrued interest thereon to June 18, 1890, amounting to ninety-five dollars and eighty-two cents. The two judgments excepted to—one in favor of M. H. Corbett for one hundred and sixty-eight dollars and nine cents, the other in favor of H. P. McGlaughlin for one hundred and sixty-five dollars and ninety-eight cents—were improperly allowed as credits to said executor upon the amount of his *devastavit*, because the same had been held to be barred by the statute of limitations, and were so barred when paid by said executor, and the two hundred dollars which was allowed as a credit to said executor was improperly allowed, as our statute

(chapter 78, section 11, Code) provides that "when any provision for a wife is made in a husband's will, she may, within one year from the time of the admission of the will to probate, renounce such provision. * * * If such renunciation be made, or if no provision be made for her in the will, she shall have such share of her husband's real and personal estate as she would have had if he had died intestate leaving children; otherwise she shall have no more thereof than is given her by the will." But even if the widow, under the circumstances of this case, had been entitled to retain the two hundred dollars, that fact would not entitle the executor to a credit for that amount. Upon this point see, also, *Cunningham v. Cunningham*, 30 W. Va. 600, 5 S. E. 139 (third point of syllabus), where it is held that, if a husband failed to renounce the provisions of a will made in his favor by his deceased wife, his right to a distributive share of her personal estate is barred, and the same rule applies to a widow who fails to renounce the provisions in her favor in her deceased husband's will within the time prescribed by statute. For these reasons my conclusion is that the court erred in overruling the exceptions indorsed on the report of Commissioner McClin- tie, filed June 18, 1890, by the attorney for the legatees, which exceptions are relied upon in said cross assignment of errors. In this respect the decree complained of should be corrected by charging the executor of said estate with the items mentioned in said last-named exceptions, and in other respects the decree complained of must be affirmed, with costs and damages.

Modified.

CHARLESTON.

SHANK *et al.* v. TOWN OF RAVENSWOOD.

Submitted January 15, 1897—Decided March 31, 1897.

1. APPEAL—*Exceptions—Plea—Waiver.*

If a plea be rejected, and no exception is made, it will not be considered in this Court. (p. 243.)

13	242
44	519
44	677

43	242
e53	475
e53	476

43	242
58	598

43	242
f63	585
e03	647

2. TOWN BOUNDARIES—*Town Council—Construction of Statute.*

The duty of a town council under section 48, chapter 47, Code 1891, to submit the question of a change of boundary to a vote, is mandatory, not ministerial or discretionary, if such petition as it prescribes is presented. (p. 244.)

3. JURISDICTION OF TOWN COUNCIL—*Record—Collateral Attack.*

In the case of an inferior court, board, or body, required to keep a record, the facts essential to give it jurisdiction must appear in its proceedings, else its action will be void and open to attack callaterally; but, if its record state such facts, its jurisdiction will not be open to attack, nor can such facts be disproven in a collateral proceeding, nor will any error appearing therein affect its action. (p. 245.)

Error to Circuit Court, Jackson county.

Application by C. C. Shank and others for a writ of *mandamus* against the town of Ravenswood. From a judgment awarding the writ, the town brings error.

Affirmed.

N. C. PRICKITT and C. E. HOGG, for plaintiff in error.

W. A. PARSONS, for defendants in error.

BRANNON, JUDGE :

C. C. Shank and others, under section 48, chapter 47, Code 1891, presented to the council of the town of Ravenswood a petition asking a change in the corporate limits of the town, as therein specified, and that a vote be had thereon, which petition was disallowed and rejected by the council. Thereupon Shank and others obtained from the Circuit Court of Jackson a *mandamus nisi* to compel the council to entertain said petition, and order a vote of the people upon the change of town limits as therein proposed; and the case ended in a final judgment awarding a peremptory *mandamus* compelling the council so to do, and the town sued out a writ of error.

A plea was tendered to the writ of *mandamus nisi*, setting up in bar of it, as *res judicata*, a judgment quashing a former *mandamus nisi* between the parties; but we cannot consider this plea, or the matter it sets up as *res judicata*, because it is not made part of the record by bill of exception or order of the court, nor is there any exception to the court's action on it. *Hughes v. Frum*, 41 W. Va.

445, 452, (23 S. E. 604); *Perry v. Horn*, 22 W. Va. 381. I think that, if one except on the record to the rejection of a plea, that will make it a part of the record, without order or bill of exception, as section 9, chapter 131, Code, says he may have the benefit of any error appearing on the record without excepting; that is, without the formal bill once required. *Danks v. Rodeheaver*, 26, W. Va. 287. But there must be an exception noted, else the rejection of the plea will be waived. If the complaint is that a plea was improperly allowed, the record must show that it was objected to; and that is sufficient without formal bill, under *Perry v. Horn*, *supra*, and *Bank v. Kimberlands*, 16 W. Va. 557; *Gilmer v. Sydenstricker*, 42 W. Va. 53 (24 S. E. 566).

The petition of Shanks was presented to the council first, and at the same meeting a petition of Leonard and others, asking a vote on a change of boundary, covering all the territory included in the Shanks petition, and some additional territory. It was therefore a different proposition. The Shanks petition was disallowed, and afterwards, at the same meeting, the Leonard petition entertained, and a vote ordered upon it. It is argued that the council had the right to select which petition it would entertain. The Shanks petition was first in time. What was the duty of council? To order a vote upon it. The statute (section 48, chapter 47, Code) is not directory, but mandatory. When a petition such as it prescribes comes before a council, it has the right, as a preliminary or jurisdictional question, to see that five persons who are freeholders have signed it, and that they are freeholders, and that it sets forth with sufficient definiteness the proposed change; but if it is such a petition as the law demands, then, as the law says "the council shall thereupon order a vote," it must do so. This is the mandatory language,—to be held mandatory because there is no question but that the intention is to give the people, on the motion of five freeholders, opportunity to pass upon the change proposed. Great public interest, convenience, and welfare are generally involved in such proceeding, and surely it was never intended to put it in the power of council to lay a veto upon the public right and power involving self-government. All that is required, or intended to be required, to call

into activity this right of the people, is such a petition. Therefore *mandamus* lies. *Summers Co. v. Monroe Co.*, 43 W. Va. 207. But it is said there were two competing propositions, and the council could delay this until the other should be put. But it was absolutely rejected, and as it had come first, and had presented the subject matter of a change of boundary, the second should be delayed, rather than the first. In fact, as this Shanks petition first set the powers of the council in motion, I think the council had the power, and was under the duty, to delay the other, because the matter of another change was pending. I will not say the first superseded this Leonard petition, but surely suspended it until after the end of the proceeding upon the Shanks petition. Two clashing proceedings and two votes could not go on at the same time. It is argued here that this second or Leonard petition could have no force as a reason for rejecting the Shanks petition, because only three of the five persons signing it were freeholders. The record of the council declares that all five were freeholders, while the facts agreed show that only three were. This raises an important question. Can we overthrow the fact stated in the order of the council, or is it conclusive on the fact it states? That fact (that is, that five freeholders signed) is a jurisdiction fact, without which the council could not act.

In the case of a court of inferior jurisdiction, and certainly in the case of a town council acting under this act, all facts necessary to give jurisdiction or power to act must appear on the face of the proceeding; and the record can not preserve mere silence on it, as may the record of a court of general jurisdiction. *Mayer v. Adams*, 27 W. Va. 244. As the record states this fact, is it conclusive against this attack,—a collateral attack? Of course, it could be denied on the Leonard petition proceeding, but this is a collateral attack made under this *mandamus*. It seems settled that, where the facts essential to give jurisdiction to an inferior or special tribunal of limited authority are shown by its record, the same presumption prevails in favor of its jurisdiction as prevails in favor of the jurisdiction of superior courts of general jurisdiction, and the statement of jurisdictional facts can not be denied upon a collateral attack, nor will its plain errors affect it.

12 Am. & Eng. Enc. Law, p. 274; Bigelow Estop. 66; 1 Herm. Estop. Res Jud. 405; Van Fleet, Coll. Attack, 538; *Morrow v. Weed*, 66 Am. Dec. 122; 1 Black, Judgm. § 287. Cannot attack collaterally proceedings of city to annex territory. *City of Terre Haute v. Beach*, 96 Ind. 143; *Kuhn v. City of Port Townsend* (Wash.) 41 Pac. 923. An inferior court or tribunal of limited jurisdiction must decide on its jurisdiction, or power to act in the matter; and, when its jurisdiction depends on a fact which it is required to ascertain before acting, the decision is held conclusive, if that fact appears in its record. Wells, Jur. § 61. Facts necessary to be shown of record by an inferior tribunal are those facts only without which it has no power to act. 12 Am. & Eng. Enc. Law, p. 274, note 2. It is objected that the Shanks petition does not give definite boundary. It seems very definite in detail,—sufficiently definite for a deed or a declaration in ejectment. In such a matter as this, they need not be so certain, and are treated with more liberality than deeds. *Hamilton v. McNeil*, 13 Grat. 389; *Douglass v. Town of Harrisville*, 9 W. Va. 163. Judgment affirmed.

Affirmed.

CHARLESTON.

ANDERSON *et al.* v. JARRETT.

(DENT, JUDGE, *absent.*)

Submitted January 27, 1897—Decided April 3, 1897.

1. WITNESS—*Competency of Witness—Death of Party.*

A written contract dividing land specifies a fence as a line, and on the day of the contract, just after its signing, one of the two parties surveys the lines, fixing a certain fence as the one referred to in the contract. That party cannot, after the death of the other, give evidence denying the fixing of that fence as the line. (p. 250.)

2. EQUITY PLEADING—*Reformation of Deed.*

A bill *held* sufficiently definite in statement of a mistake in a deed in order to correct it. (p. 247.)

Appeal from Circuit Court, Greenbrier county.

Bill by Mrs. Anderson and others against Joseph Jarrett.
Decree for plaintiffs, and defendant appeals.

Affirmed.

JOHN W. HARRIS, for appellant.

L. J. WILLIAMS, for appellees.

BRANNON, JUDGE :

Joseph Jarrett and his daughter Virginia Anderson owned jointly a tract of three hundred and fifty acres of land, and Jarrett owned alone an adjoining tract of one hundred and ninety acres. The three hundred and fifty-acre tract was made up of two tracts, one called the Feamster land, the other the Shuck land, and the one hundred and ninety-acre tract was called the Carraway land. Jarrett and Mrs. Anderson entered into a written agreement, by which Jarrett agreed to convey to Mrs. Anderson the Carraway land (one hundred and ninety acres) and the Shuck land (part of the three hundred and fifty acres), and she agreed to convey to Jarrett the remainder of the three hundred and fifty acres, the Feamster land. Before the execution of deeds under this agreement, Mrs. Anderson died, leaving infant children, and Jarrett brought a suit against them, to execute the agreement, in which was a decree that it be executed by the execution by a commissioner of a deed to Jarrett in behalf of Mrs. Anderson's heirs for the land he was to get under it, and one to the heirs for the land which Mrs. Anderson was to get under it, and authorizing the commissioner to have a survey made, and to make the deeds conformably to it. Such survey was made, and the deeds were made according to it. Later the heirs of Mrs. Anderson brought this suit, alleging a mistake in some of the lines of said deeds, whereby Jarrett got six or seven acres of land belonging to Mrs. Anderson under the agreement, and praying that said deed be reformed by the correction of such mistake; and, the court having decreed such reformation, Jarrett appeals.

It is said in argument, in support of the appeal, that the demurrer to the bill ought to have been sustained, because it does not set forth with sufficient definiteness the al-

leged mistake sought to be corrected; that it does not tell wherein the bounds in the deeds fail to conform to the contract; that while it charges that Jarrett and Mrs. Anderson went upon the land when the agreement was made, and marked off the lines, the bill does not say in what respect they differ from those contained in the deeds. I can not concur in this contention. The bill alleges that the metes and bounds of the deed do not conform to those of the agreement of partition between Jarrett and his daughter; that the agreement provides the manner in which the Shuck land should be run off to Mrs. Anderson, by saying that, "in running off the Shuck land, the line shall commence at a corner on the old Vina plat, at or near where the old sawmill used to stand, and run said line and continue the same until it reaches the old fence between the Feamster land and Shuck land, and then, with said fence, to Hannah or Hedrick place"; and charges that, at the time of making the agreement, Jarrett and Mrs. Anderson went upon the land, and Jarrett marked off the lines as above mentioned in the contract; that the metes and bounds in the deeds pretend to follow the lines as agreed upon, but in reality do not; that the discrepancy exists between the lines of the contract and certain lines of the deed, describing definitely, by magnetic calls and distances and otherwise, those particular lines specified as erroneous; and then charges that there are near the same place two old fences, and that the metes and bounds given in the deeds pretend to follow one of them, but that that is not the fence dividing the Shuck land from the Feamster land, nor the one agreed upon by Mrs. Anderson and Jarrett, thus plainly meaning to say it is the other fence; and then charges that the land between the lines agreed upon in the contract and those of the deeds embraces six or seven acres, meaning that the line, if run by the proper fence,—not the one followed by the deeds, but the one which they should follow,—embraces that quantity, plainly contending that the line should follow the one rather than the other of these fences, and thus give Mrs. Anderson's children that quantity of land lying between two lines following the two fences conveyed by the deed to Jarrett. This description of the land claimed is said to be so indefinite as not to support a bill for specific perform-

ance, under *Matthews v. Jarrett*, 20 W. Va. 415, or ejectment under *Postlewaite v. Wise*, 17 W. Va. 1. I incline to think it would support the former, if not the latter; but I do not think that either is a fair test. It is not so much a description of the land claimed, as in those proceedings, but a correction of the mere lines of the deeds. All that can be demanded is that the bill tell what is the mistake. Does it not do this? It tells just what particular lines are wrong. It does this, certainly. Does it say how or why wrong? I think so, because it says that a line must start at a corner on the Vina plat at the old sawmill site, and go to the old fence between the Feamster land and Shuck land, and then follow that fence to the Hannah or Hedrick place, where it is to be closed with other lines of the deed not complained of. Does not the bill point out with reasonable certainty the wrong lines and the right ones? It further says the right lines were marked at the date of the agreement by Jarrett. Data for the ascertainment of the right lines are given, and all that is needed is oral evidence to find this old fence along which Jarrett marked the line, and, by the compass and chain, ascertain calls and distances to go into a reformed deed. You have right to use oral evidence to apply this bill, like a deed, physically to the ground. The bill gives the wrong lines, clearly. It says Jarrett and Mrs. Anderson fixed the right ones. Identify these lines they made by oral evidence, as the law allows, and they are the ones we seek to go in the deed, as the acts of parties under an instrument speak its true meaning and import. *Caper-ton's Adm'rs v. Caper-ton's Heirs*, 36 W. Va. 479, (15 S. E. 257); *Shrewsbury v. Tufts*, 41 W. Va. 212, (23 S. E. 692). This is not to contradict or alter a writing, but only to apply it to the subject-matter it relates to. 1 Greenl. Ev. §§ 287, 288, 301. So, I think there was no ground for demurrer.

Adverting now to the aspect of the case as presented by the evidence, as the case rests on a very considerable quantity of oral evidence, and considerably conflicting, I do not see why we can be expected to reverse the findings of fact made by the chancellor below. It cannot be requisite, or even proper, that I detail evidence, or even all the facts, as they elucidate no principle of law, and would be no precedent for future cases.

It suffices to say that three witnesses show that, after the said agreement on the same day, Jarrett and those three persons went with compass and chain on the ground, and ran the line from the corner on the Vina plat, near the site of the sawmill, to an old fence down under a hill, and thence along it, and this at Jarrett's direction, and thus adopted that particular old fence as the particular fixed line by which the Shuck land was to be assigned to Mrs. Anderson under that agreement; and that there was another old fence on top of the hill; and that when the surveyor went on the ground, under the decree in the suit of Jarrett, to survey preparatory to the execution of deeds under the decree (Mrs. Anderson then dead), the old fence under the hill fixed by Jarrett at the date of the agreement was, either purposely or by mistake, ignored, and the line of the fence on top of the hill fixed as the line, and the deeds made by it; and that Jarrett has fenced on it, and thus included land belonging to the children of Mrs. Anderson. He inconsistently adopted one of the fences in part; the other in part. These facts are clearly shown by the witnesses present at the first survey. There is no showing to the contrary, save by Jarrett, and this justifies the decree, even if Jarrett be competent as a witness. He denies that the fence under the hill was fixed as a line. Mrs. Anderson was not on the ground when this line was fixed, but she had just before taken active part in the negotiation of the partition; and this was the fixing of lines under the agreement, a part of the *res gestæ*, we may say, of its execution, tending to show what the real transaction was, what line had been agreed upon; and that is the test of admissibility,—*i. e.* does the thing said or done show what the real transaction between the parties was? And, if so, it is not admissible. *Parton v. Parton*, 38 W. Va. 619 (18 S. E. 765). I have just cited authority to show that acts of the parties under an instrument interpret it,—show what the contract was. Why may we not say that it was agreed between Mrs. Anderson and her father that the old fence under the hill should be the one? If living, perhaps she would say so, and so show that he did fix that fence as the line, and negative his denial. He cannot say that he fixed the other fence as the line. I think our cases will show this. *Robinson v. James*, 29 W. Va. 224, (11 S.

E. 920); *Owens v. Owens*, 14 W. Va. 95; *Anderson v. Cranmer*, 11 W. Va. 576. But his evidence on this is overborne by that of the three witnesses. He says he built a fence in the lifetime of Mrs. Anderson on the line claimed by him, thus showing her acquiescence. He could not be allowed to say she agreed to that line, and he can not do the same thing indirectly. The answer sets up no mistake of Jarrett in locating the line on the day of the contract, and, though this is argued in brief of appellees' counsel, it is not by counsel for appellant, and it is not necessary to pursue it. He does not allege mistake in his evidence, but denies fixing that fence for a line.

It is urged in the petition for the appeal that the line claimed by the Anderson children is not the true, original line separating the Shuck from the Foamster tract, and the contract says she gets the Shuck land. I answer that, if its locality was uncertain, the agreement was designed to make it certain; and, if it varies from it, such was the intent of the parties, because they made the contract specify that old fence as the line, thus intending change; and thus we may say that Jarrett, on the day of the contract, in fixing this line, was not finding the original Shuck line, but originating and fixing a line agreed on between him and Mrs. Anderson, as specially agreed on. The statement in the agreement that Mrs. Anderson was to get the Shuck land was a general description of the land, not definitive of this line when a special clause fixed this particular line or description. Where there are inconsistent calls,—one general, the other specific,—the specific prevails. 2 Am. & Eng. Enc. Law, 498; 1 Greenl. Ev. § 301. The short of the case is that the line claimed by the plaintiffs is that one located by Jarrett himself, pursuant to and in immediate execution of the agreement, no doubt along just that fence well known and well understood by him and his daughter.

It cannot be said that the adjudication in the first suit is conclusive. It did not specify the line, but (likely improperly) left it to be ascertained by after-surveying, not confirmed by court, and the line was fixed by it and the commissioner's deed, and not adjudicated as true. This point is not urged; hardly claimed as good. The decided

weight and probability of the case as to the facts favor the decree, and we therefore affirm it.

Affirmed.

CHARLESTON.

CRAWFORD v. RITCHEY.

Submitted February 6, 1897—Decided April 3, 1897.

1. OIL AND GAS LEASE—*Cancellation of Lease—Equity Jurisdiction.*

Where a lease is made on the 12th day of April, 1889, "for the sole and only purpose of drilling and operating for petroleum oil and gas for the term of twenty years, or as long thereafter as oil or gas is found in paying quantities," and providing that the lessee shall commence one well on or before the 10th day of May, 1889, and prosecute the same to completion, unavoidable accidents excepted, and on the 26th day of October, 1889, the time is extended for such commencement of work by written endorsement on the lease to the 28th day of November, 1889, and nothing is done under said lease for the period of seven years from said last-named date, the lessee is presumed to have abandoned the said lease, and a court of equity may entertain a suit to cancel the lease and quiet title. (p.258.)

2. EQUITY—*Discretion of Court.*

A party has not an absolute right to the interference of a court of chancery to relieve him against his own act, but it is a matter of sound discretion, to be exercised by the court according to its own notion of what is reasonable and proper under all the circumstances of the particular case. *Eckman v. Eckman*, 55 Pa. St. 269. (p.259.)

Appeal from Circuit Court, Marshall county.

Bill by Robert Crawford against J. B. Ritchey. From a judgment sustaining a demurrer to the bill, plaintiff appeals.

Reversed.

ROBERT WHITE, for appellant.

J. B. McLURE, for appellee.

McWHORTER, JUDGE :

At the April rules, 1896, Robert Crawford filed his bill in chancery in the Circuit Court of Marshall county against J. B. Ritchey, showing that the plaintiff and defendant entered into a written contract, as follows :

"This lease made this 12th day of April, A. D. 1889, by and between Robert Crawford, of Cameron township, of the county of Marshall and state of W. Va., of the first part, and J. B. Ritchey, of West Middleton, Washington Co., Penn., of the second part, witnesseth : That the said party of the first part, in consideration of the stipulations, rents, and covenants hereinafter contained on the part of the said party of the second part, his executor, administrators, and assigns, to be paid, kept, and performed, have granted, devised, and let unto the said party of the second part, his executors, administrators, and assigns, for the sole and only purpose of drilling and operating for petroleum oil and gas for the term of twenty years, or as long thereafter as oil or gas is found in paying quantities, all that certain tract of land situated in Cameron township, Marshall Co., and state of West Va., bounded and described as follows, to-wit : On the east by lands of Wm. Woodburn and others, on the north by lands of Samuel Kettle and others, on the west by land of Thompson and London, on the south by lands of town of Cameron, containing two hundred and sixty-four acres, more or less, excepting and reserving therefrom thirty rods around the buildings on the premises, upon which there shall be no wells drilled, the boundaries of which shall be designated and fixed by the party of the first part. The said second party hereby agrees, in consideration of the said lease of above-described premises, to give said first party one-eighth ($\frac{1}{8}$) of all the oil or mineral produced and saved from said premises; and further agrees to give \$300 per annum for the gas from each and every well drilled on the above-described premises in case the gas is conducted and used off the above-described premises; the second party not to unnecessarily disturb growing crops thereon, or the fences. Said second party has the right, which is hereby granted him, to enter upon the above-described premises at any time, for the purpose of mining or excavating, and the right of way to and from the place of mining

or excavating, and the exclusive right to lay pipe lines for the purpose of conveying and conducting water, steam, gas, or oil over and across the said premises, and also the right to remove at any time any and all machinery, oil well supplies, or appurtenances of any kind belonging to said second party. The party of the second part, his heirs and assigns, further agree to commence one well in Cameron or Liberty township, Marshall Co., West Va., on or before the 10th day of May, 1889, and prosecute the same to completion, unavoidable accidents excepted. It is further agreed, if gas is found in sufficient quantity, then first party shall have free gas for dwelling house and store (test well to be started on above farm, as per date above). It is understood by and between the parties to this agreement that all conditions between the parties hereto shall extend to their heirs, executors, and assigns. In witness whereof, we, the said parties of the first and second part, have hereto set our hands and seals, the day and year above written. Robert Crawford. [L. S.] J. B. Ritchey. [L. S.]

“Witness: T. L. Davis.

“Cameron, West Va., Oct. 26th, 1889. It is agreed between the first and second party of within contract that the time for commencement of first well in Liberty or Cameron township as within mentioned shall be extended until the 25th day of November, 1889, and prosecuted to completion as stated in lease. In witness whereof, we set our hands and seals. Robert Crawford. [Seal.] J. B. Ritchey. [Seal.]

“Witness: T. L. Davis.”

—Which lease was duly sealed, acknowledged, and recorded in the clerk’s office of the county court of Marshall county.

Plaintiff charged in his said bill that it was the purpose, understanding, and intention between the said parties to the contract that the real estate therein described was to be used for the production of oil and gas, if any could be found, and that it was the purpose, understanding, and intention of the said parties, in entering into the said contract, that the said defendant should proceed to develop the said property as to said productions; and it was agreed thereby that a test well should be started

on the said farm before the 10th of May, 1889, for the purpose of such development thereon. Plaintiff further shows that such development of such property was the reason for his entering into the said contract with the said defendant, and that said lease or contract constituted a grant of the said property to the said defendant to bore, drill, or mine for oil or gas on the said property, and that it was the duty of the said defendant to have proceeded within a reasonable time, as the plaintiff charges as aforesaid, to develop whatever kind of oil or gas might be in said property at the time named, and further charges that the said defendant has not in any shape or form developed or attempted to develop the said property, or never endeavored to find any oil or gas thereon, and distinctly charges that the said defendant has utterly failed to even commence the said test well situated on said farm or property, as it was provided by said contract. Plaintiff further charges that the material consideration of his entering into the said contract was the development of whatever oil or gas may have been in or upon said property within a reasonable time, and that the provision as to such test well thereon was for that reason and purpose. He charged that under said contract it was the duty of said defendant to commence and complete such test well, and therefore prayed that the contract be set aside, and declared null and void, and for general or special relief, *etc.*

On the 10th day of September, 1896, the bill was demurred to; and the court sustained the demurrer. The plaintiff asked leave to file an amended bill, which was granted, and it was filed, wherein he charges, in addition to the allegations in the original bill, the following allegations: "That he demanded of and requested the defendant to proceed to develop said property, and to carry out the purposes, undertaking, and intentions before referred to between the parties: but said defendant never in any way respected said demands and requests. Yet said plaintiff charges that said defendant has in no way performed or attempted to perform his duty in this regard, and that defendant is not now, nor has he been since the date of said contract, nor was he then, a citizen or resident of the State of West Virginia, and that there is and can be no

way to ascertain damages which could be recovered at law by reason of the acts of the said defendant in connection with said contract, or by reason of the failure and neglect of the defendant hereinbefore set out in any way, or either of them; that there is not, and has not been, any market value by which the measure of such damages could be ascertained at law; that in fact the plaintiff has in this matter no real compensatory remedy at law; that plaintiff is by reason of said contract and of the premises aforesaid injured; that he is prevented and delayed in the enjoyment of said property, and particularly in its development for gas and oil; that his right and use to the enjoyment of said property, particularly in the developing of oil and gas in or upon said land by himself or through others, is, by reason of the premises aforesaid, affected, retarded, injured, and beclouded; and that gas and oil is being now, and has for a long time past been, developed in and upon the lands near and in the region of the said land described in said contract, which, by reason of the premises aforesaid, the development of said land is not only impeded by said contract, and the said conduct and neglect aforesaid of said defendant with reference thereto, but in fact the development of said territory for oil and gas has thereby been prevented; that neither plaintiff nor defendant has assigned or transferred any right or rights that either may have had under said contract. Plaintiff prays that the said J. B. Ritchey may be made defendant to this amended bill, and required to answer the same; that the rights of said Ritchey under and by virtue of said contract may be declared by this court to cease and be at an end, and that thus the plaintiff may be fully enabled to use and enjoy his said property, to develop the same for oil and gas, or either, or have the same developed without let or hindrance by the defendant or any one for said defendant, and for such other relief, either general or special, as the nature or the case requires," *etc.*,—to which amended bill the defendant also demurred, and the court sustained the demurrer, and dismissed the bill, with costs.

The first assignment is that the court erred in sustaining the demurrer to the original bill, and the second, in sustaining the demurrer to the amended bill, and dismissing the same. This was a contract made April 12, 1889, and,

by its terms, the lessee was to begin a well on or before the 10th of May, 1889, less than a month from the date of the lease, and prosecute the same to completion, unavoidable accidents excepted. Nothing was paid for this lease, and nothing to be paid if no oil or gas was found. On the 26th of October of the same year, it was further agreed by writing on the lease, and signed by the parties, that the time for so commencing the first well should be, and was thereby, extended to November 28, 1889, and to be prosecuted to completion as stated in the lease. It would seem from this indorsement that the parties both understood that defendant had no right even at that date to proceed under the lease, without the consent of plaintiff. It was the duty of defendant to begin his work at the time specified, and to complete it in a reasonable time. The amended bill alleges that gas and oil have been developed in and upon other lands near to and in the region of the leased premises, and were at the time of the filing of the amended bill being so developed; and that, by reason of the said contract of lease, he has not only been impeded in, but prevented from, developing his said territory, alleging that he is injured thereby, that his title is beclouded, and that he has no adequate remedy at law; he cannot have his action of ejectment, he being in possession; and there is no way of ascertaining the measure of damages. The defendant has no vested title, and has abandoned the lease, never having done anything under the lease after a lapse of about eight years. This on the theory that the allegations of the amended bill are true, which, by his demurrer, the defendant admits. *Oil Co. v. Fretts*, 152 Pa. St. 451, (25 Atl. 732). A vested title can not ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. A lease of a right to mine for oil, *etc.*, stands on different ground. The title is inchoate, and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract.

If defendant had possession under the terms of his contract, and developed gas and oil, or either, he would have had vested rights, of which he could not have been ousted or divested; but the lease being "for the sole and only purpose of drilling and operating for petroleum oil and gas, for the term of twenty years, or as long thereafter as oil or gas is found in paying quantities," and providing that he shall commence within a month in the first instance, and afterwards a few months, when it is by consent renewed and extended from October 26 to November 28, 1889, to begin the work, he must be presumed to have abandoned it. In the case of *Iron Co. v. Trout*, 83 Va. 397 (2 S. E. 713), the court says: "The lease was for a term of twenty years; yet, looking to its nature and object, it cannot be contended that the lessees had the option to work or not to work the ore mines for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessors into a mere barren incumbrance on his hand,—a cloud on his title, an incubus and a manacle, which would oppress him, and destroy the marketable value of his land. No lease of land for a rent, for a return to the landlord out of the land which passes, can be construed to be intended to enable the tenant merely to hold the lease for purposes of speculation, without doing and performing in connection therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landowner. A man buying and paying for land may do with it what he likes,—work it, or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion. He must perform what he stipulated to do; and, if he has obtained the lease by misrepresentation and fraud, the lessor may have it rescinded in equity." It is true there is no allegation in the bill that the lease was procured by fraud, but when nothing has been done under the contract for the period of nearly eight years, when it was stipulated therein for work to be commenced within one month from the date of the contract, the presumption is that the lessee has abandoned the lease; and, if such abandoned lease interferes with and hinders the development of the leased premises and enjoyment thereof, a court of equity may entertain a

suit to cancel lease and quiet title. *Eckman v. Eckman*, 55 Pa. St. 269: "A man has not an absolute right to the interference of a court of chancery to relieve him of his voluntary act, but it is a matter of sound discretion, to be exercised by the court, according to its own notion of what is reasonable and proper, under all the circumstances of the particular case." The court erred in sustaining the demurrer to plaintiff's amended bill, and dismissing same. The decree complained of is therefore reversed, and cause remanded for further proceedings to be had therein.

Reversed.

CHARLESTON.

YEAGER *et al.* v. TOWN OF FAIRMONT.

(DENT, JUDGE, *absent.*)

43	259
43	545
43	259
146	443

Submitted February 1, 1897—Decided April 3, 1897.

1. MUNICIPAL CORPORATIONS—*Change of Grade—Surface Water—Damages.*

Where a town, in grading its streets, raises the grade so as to cast the surface water on an adjoining lot occupied by a storeroom, if the grade of such street is not raised in violation of the Constitution, or some statute law, or the charter of the town, no action can be maintained by the adjoining lot owner for damages sustained by reason of casting said surface water on said adjoining lot, unless the surface water is collected in a body and cast upon said lot. (p. 264.)

2. DAMAGES TO REAL ESTATE—*Surface Water—Tenant for Life—Remainder Man—Joinder of Parties.*

Where a lot injured by raising the grade of a street, and casting surface water thereon, as above stated, is held by M. E. as a tenant for life, and G. G. is entitled to the remainder in fee, and said M. E. and G. G. are engaged in the mercantile business as partners in a storeroom upon said lot, which storeroom is permanently injured by said surface water, said M. E. and G. G. cannot recover in the same action for damage done to the life estate, the remainder, and the joint mercantile business by raising the grade of said street and causing the surface water to flow on said lot. (p. 264.)

3. DAMAGES TO REAL ESTATE—*Tenant for Life—Remainder-Man—Separate Actions.*

Where a tort upon realty affects both the estate of a tenant for life and that of a remainder-man, each may sue separately, and, as the damages are apportionable, each recovers damages to cover the injury done to his estate. Neither can recover damages covering the entire injury to both estates. (p. 265.)

Error to Circuit Court, Marion county.

Action by George Yeager and M. E. Yeager against the town of Fairmont. Judgment for plaintiffs, and defendant brings error.

Reversed.

W. S. HAYMOND and W. S. MEREDITH, for plaintiffs in error.

DOVENER & CONIFF, for defendants in error.

ENGLISH, PRESIDENT :

This was an action of trespass on the case brought by George G. Yeager and M. E. Yeager against the town of Fairmont, in the Circuit Court of Marion county, to recover damages alleged to have been occasioned by a change of grade in the streets of said town adjoining the property of the plaintiffs. A demurrer to the plaintiffs' declaration was interposed by the defendant, and upon consideration was overruled by the court, and thereupon the defendant plead not guilty, and issue was thereon joined. On the 12th day of July, 1895, the case was submitted to a jury, which resulted in a verdict for the plaintiffs for the sum of two thousand five hundred and fifty dollars: and thereupon the defendant moved the court to set aside the said verdict, and grant it a new trial, upon the ground that said verdict was contrary to the law and the evidence, and because of the improper instruction given by the court to the jury at the instance of the plaintiffs, and because of the variance between the allegations of the declaration and the proof, and because the damages assessed by the jury were excessive; which motion was overruled by the court, and the defendant excepted to said ruling, and asked the court to certify the evidence. On the 18th of July, 1895, judgment was rendered upon the said verdict

and the defendant applied for and obtained this writ of error.

The first error assigned and relied upon by the defendant is to the action of the court in overruling defendant's demurrer to plaintiff's declaration. Counsel for the plaintiff in error insist that the court erred in overruling said demurrer for the following reasons:

The declaration alleges that the plaintiff George G. Yeager was the owner in fee simple of the real estate claimed to have been injured, and that the plaintiff M. E. Yeager was the owner and possessor of a life estate in the same; that this is impossible. A fee simple being the highest estate known to the law, it is the entire and absolute property, and it is impossible for one plaintiff to own the fee simple while the other owns a life estate in the same property at one and the same time; citing Tied. Real Prop. § 36, for the definition of "fee simple," where it is said: "'Fee simple' is a freehold estate of inheritance, free from conditions and of indefinite duration. It is the highest estate known to the law, and is absolute, so far as it is possible for one to possess an absolute right of property in lands."

It is also contended that allegations of special title must be proved as laid, citing 1 Chit. Pl. 379, 380, 384, and insisting that it is absurd to contend that the special title as laid in the declaration can be proved.

By referring to the declaration, it will be seen that it is alleged that, at the time of the committing by the defendant of the grievances hereinafter mentioned, the said plaintiff, George G. Yeager, was and is the owner in fee simple, and the said M. Yeager was the owner and possessor of a life estate in a certain parcel or lot of ground lying within the corporate limits of the said town of Fairmont, Marion county, W. Va., which is described in the declaration, and which said George G. Yeager and M. E. Yeager, as joint plaintiffs, complained was damaged by raising the grade of the street adjoining thereto in said town in the manner set forth in the declaration. The contention of the defendant is that this was a misjoinder of plaintiffs, and the first question for consideration is whether this question can be raised by demurrer, or whether it should have been properly raised by a plea in abatement. The

character of the interests owned by the respective parties is averred on the face of the declaration. When such is the case, we find the law, as to the manner in which the question may be raised, stated in 1 Chit. Pl. p. 75, as follows: "If, however, too many persons be made co-plaintiffs, the objection, if it appear on the record, may be taken advantage of either by demurrer, in arrest of judgment, or by writ of error." The same author, on page 73 of same volume, says: "When two or more persons are jointly entitled to have a joint legal interest in the property affected, they must in general join in the action, or the defendant may plead in abatement, and, though the interest be several, yet if the wrong complained of cause an entire joint damage, the parties may join or sever in the action; but as the courts will not in one suit take cognizance of distinct and separate claims of different persons, where the damage as well as the interest is several, each party injured must in that case sue separately." See 17 Am. & Eng. Enc. Law, p. 588, where, in speaking of parties to actions, it is said: "All the plaintiffs must have an interest in the subject-matter of the action and in obtaining the relief demanded, and therefore two or more plaintiffs, having distinct causes of action, may not be joined." Hogg, in his valuable work on Pleading and Forms (page 30, § 43), says, under the heading of "Distinct and Separate claims of Different Persons in One Suit": "As to joinder of plaintiffs in actions of tort, it is a general rule that, if they have a joint interest in the property affected, they must join in the action or the defendant may plead the nonjoinder in abatement. But a joint tenant or tenant in common need not join his co-tenant in an action to recover the common real property in unlawful entry and detainer. Each has a right to the whole as against strangers and wrongdoers. But if the action concern personal property, they must join. If parties have several and distinct interests, they might sue severally. Courts will not take cognizance in one suit of distinct and separate claims of different persons where the damage, as well as the interest, is several, and hence each party injured must sue separately." Upon this question see, also, 1 Bart. Law Prac. § 80, where it is said: "The failure to make the proper contracting persons parties defendant to the suit

can only be taken advantage of by plea in abatement, save where it appears on the face of the declaration; but, if there be a misjoinder or nonjoinder of plaintiffs, the objection may be made upon the trial and upon general issue. If the omission appear in the pleadings, advantage of it may be taken by demurrer, motion in arrest of judgment, or writ of error: but, if it only be disclosed by the evidence, the plaintiff will be nonsuited." We find the law stated in 1 Add. Torts, § 407, under the heading of "Division of Rights—Tenant and Reversioner": "The actual occupier of real property is always entitled to maintain an action for unjustifiable trespasses thereon, but the owner who has parted with the possession in favor of a tenant or lessee can only maintain an action if an injury is done to his reversionary estate. If a house or land is occupied merely by the servant of the owner, the occupation of the servant is the occupation of the owner, and the latter, being then the occupier as well as the owner, may sue for any temporary trespass or injury rendering his occupation less profitable or commodious; but where the land has been demised to a lessee, who has entered thereon and is clothed with the possessory interest, the lessee, and not the landlord, is the proper party to sue for a trespass on the property, unless the wrongful act complained of imports a damage to the reversionary estate. Where the injury is of a permanent nature, and deteriorates the marketable value of the property, so that, if the landlord or reversioner were to sell it, it would fetch less money in the market, there is a damage to the reversionary estate, in respect of which the reversioner may maintain an action."

Now, when we look to the declaration, it is apparent the gravamen of this action consists in the alleged injury to the storehouse therein described. It is alleged that the plaintiff George G. Yeager was, and still is, the owner in fee simple, and the plaintiff M. E. Yeager was the owner and possessor of a life estate, in the lot or parcel of ground therein described upon which said storehouse is situated, and that the damage complained of was occasioned by raising the grade of the streets adjoining said lot twenty-eight inches higher than the floor of said storehouse, thereby obstructing the free ingress and egress of said plaintiffs and their customers and patrons in their said business to and

from said storehouse, and thereby causing the water and snow falling upon and accumulating upon said adjoining streets to drain and accumulate and stand in front of and around said plaintiffs' said storehouse, and to fall into and upon the floor of the plaintiffs' said store, and into the cellar of the same; that by reason of said change of grade, and the drainage of water upon the plaintiffs' said lot, the foundations and wall of said house became dampened and weakened so as to injure permanently the same, and to render said house, as well as said lot, unhealthy and unfit for use for the purposes and business mentioned in the declaration.

It will be perceived that this declaration claims damages for three different and distinct causes of action, to wit: Injury to the life estate, of which M. E. Yeager is alleged to have been the owner and possessor; the injury to the fee simple, by which is evidently meant the remainder or reversion to which George G. Yeager was entitled; and the injury to the joint mercantile business in which said plaintiffs were engaged in said storehouse. If it was proper to combine all three of these causes of action, it is difficult to determine in what manner the damages recovered should be apportioned among them. If the suit was in equity, the value of the life estate might be ascertained, and yet it would be difficult to say what portion of the damages should be awarded the life tenant and what portion to the remainder-man, and equally difficult to ascertain what portion the plaintiffs were entitled to jointly by reason of the injury to their mercantile business. A case involving several questions similar to the one under consideration was recently decided by this Court, and will be found in 42 W. Va. 300 (26 S. E. 266). I refer to the case of *Jordan v. City of Benbrook* (decided November 18, 1896), in which it was held "that a city is not liable for damages to a lot owner because change of grade of a street prevents surface water of a lot from flowing off. It is not different even if the surface water is, by reason of such change of grade, increased in quantity upon the lot, if not cast in a mass or body upon the premises. Nor is a city liable for mere surface water flowing from the street upon an adjoining lot." And it was further held in said case that,

“where a tort upon realty affects both the estate of a tenant and that of a reversioner or remainder-man, each may sue separately, and, as the damages are apportionable, each recovers damages to cover the injury done to his estate. Neither can recover damages covering the entire injury to both estates.” In that case a party entitled to the reversion or remainder was plaintiff in the suit, while the life tenant was in possession, and BRANNON, JUDGE, in delivering the opinion of the Court, said: “Another question is whether the verdict should be set aside because it appears that the plaintiff recovered as for the entire damage to the premises instead of only for damage to her remainder. The declaration counted only on damage to the reversion, and we do not know how the jury reached the sum it did reach. We do not know whether it deducted for the life estate of Mrs. Clark, then in possession; but, as there is no evidence of any discrimination, it may be said to cover the entire estate for life and in remainder. If there be a tenant for years or life in actual possession, he can sue for any trespass affecting his immediate residential interest, and the reversioner or remainder-man, if the act does a permanent injury to the inheritance, may sue as to that. * * * The particular tenant recovers for damage only to present enjoyment, covering his entire term if it affects the entire term, and the remainder-man or reversioner only for damage to the remainder or reversion.”

Returning again to the question of the liability of the corporation by reason of raising the grade of the streets, we find that Elliott, *Roads & S.* p. 336, says: “The general rule is well established that a municipal corporation is not liable for consequential damages necessarily caused in grading a street, unless the corporation is made liable by the constitution or by some provision in its charter or of the statutes of the state.” On this same question, 2 Dill. Mun. Corp. § 989, in speaking of the change of grade in streets, says: “In connection with the principle just mentioned, that there is no implied or common-law liability for doing with proper care an act which is either directed or authorized by a valid statute, may be noticed the power of municipal corporations to grade and to change established the grade or level of their streets, though the

exercise of the power may be injurious to the adjoining property owners." And in section 990 the same author says: "Accordingly the courts by numerous decisions, in most of the states, have settled the doctrine that municipal corporations acting under authority conferred by the legislature to make and repair, or to grade, level and improve, streets, if they keep within the limits of the streets, and do not trespass on or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner whose lands are not actually taken, trespassed upon, or invaded for consequential damages to his premises, unless there is a provision in the constitution of the state, in the charter of the corporation, or in some statute creating the liability. There is no such implied or common-law liability, even though in grading and leveling the street a portion of the adjoining lot, in consequence of the removal of its natural support, falls into the highway." "And the same principle applies, and the like freedom from implied liability exists, if the street be embanked or raised in reducing it to the grade line, so as to cut off or render difficult the access to the adjacent property. And this is so although the grade of the street has been before established and the adjoining property owner had erected buildings or made improvements with reference to such grade." This states correctly the common-law rule, but our Constitution provides that private property shall not be taken or damaged for public use without just compensation. The same author, in section 1043, says: "If, in consequence of filling streets and cross streets to the established grade line, water is collected in ponds or pools upon the adjoining lots, which are thus brought below the level of the streets, the corporation is not liable for damages thereby occasioned,"—citing numerous authorities in support of the proposition. In the case at bar it is apparent that there are three distinct causes of action asserted in the declaration: First, the claim for damage to the remainder-man or reversioner; second, the claim for damages resulting from injury to the life estate; and, third, the claim for damage inflicted upon the joint mercantile business of the plaintiffs by the action of the defendant in raising the grade of its streets. So far as the damage complained of

results from casting surplus water on this lot which adjoined the street by reason of raising the grade of the street, we have seen that no action accrues to the plaintiffs if such grading had not been done in violation of the charter of said town, the Constitution of the State, or some statute law; neither does any action accrue to the plaintiffs jointly in this suit from the fact that raising the grade makes ingress and egress to and from said storehouse difficult. For these reasons my conclusion is that the circuit court erred in overruling the defendant's demurrer to the plaintiffs' declaration. The judgment complained of is therefore reversed, the verdict set aside and, this Court proceeding to render such judgment as should have been rendered, the demurrer is sustained, and the plaintiffs' suit dismissed, with costs.

Reversed.

CHARLESTON.

43	267
65	621

GAY *et al.* v. LOCKRIDGE *et al.*

Submitted January 27, 1897—Decided April 7, 1897.

1. **DOWER—Release of Dower—Burden of Showing Release.**

Where a widow's dower is a charge on a certain tract of land, the burden is on the purchaser of the whole or a part thereof, or those claiming under him, to show that such purchase was made free and acquit from such dower. (p. 269.)

2. **COMMISSIONER'S REPORT—Exceptions—Appeal.**

When an exception to a commissioner's report is based on legal grounds, founded on the pleading and exhibits alone, such report will be taken as conclusive as to any finding that might be affected by extraneous evidence. In the absence of exception on this ground, it will be presumed that such commissioner had before him sufficient extraneous evidence to sustain his finding. (p. 270.)

Appeal from Circuit Court, Pocahontas County.

Suit by Levi Gay and another against J. B. Lockridge and others. From a decree against her, defendant Lillie B. Lockridge appeals.

Reversed.

L. M. McCLINTIC, for appellant.

W. M. & J. T. McALLISTER, for appellee.

DENT, JUDGE :

Lillie B. Lockridge appeals from a decree of the Circuit Court of Pocahontas county in the case of Levi Gay and J. P. Hawkins, plaintiffs, against J. B. Lockridge *et al.*, and assigns for error the holding of the court that she was not entitled to dower in the land in controversy. The facts are as follows : James T. Lockridge, the husband of appellant, during his lifetime, was seised in fee simple of a certain one thousand four hundred and thirty-four-acre tract of land, which was sold to pay liens thereon inferior to the appellant's contingent right of dower therein, in the year 1885, and purchased by H. M. Lockridge. Afterwards, in the year 1886, James T. Lockridge died, and the dower of appellant in said tract of land became consummate. In the year 1888, H. M. Lockridge conveyed one-third of said land to J. T. Lockridge by deed, with covenant of special warranty in which appellant did not join. The creditors of J. T. Lockridge, having instituted proceedings to sell said third, insist that the appellant's dower should be in whole imposed on the remaining two-thirds, and thus relieve the one-third first sold for their benefit. This depends, at least to some extent, on the understanding with which J. T. Lockridge took a conveyance of the third. If it was agreed that it should remain subject to its fair proportion of the dower, it must do so, as the creditors take only the estate of J. T. Lockridge therein. On the other hand, if J. T. Lockridge purchased the land free from said dower, then the creditors would be entitled to it in the same condition. The dower was never assigned in kind, nor could the widow have it so assigned ; but, under the provisions of section 12, chapter 65, Code, she must accept a money compensation therefor, which remained a charge on the land. In this respect she was entirely at the will of the owner. He may sell and dispose of a part of the land without her consent, for a full compensation ; and, as between him and his vendee, the remaining portion of the land becomes first liable for the full dower charge. Or he may sell the one-third with the understanding that it is to

be first liable for its fair proportion or the whole of the dower; this between himself and his vendee, without consulting the dowress. On whom, then, is the burden of proving that the widow has lost her right to charge the land with her dower? Certainly on the parties who assert it. The mere fact that H. M. Lockridge sold one-third, and retained two, is not evidence that the sale was made free from the dower incumbrance extending to the whole; while the fact that the appellant did not join, or was not asked to join, in the deed, is presumptive evidence that the sale was made subject to the incumbrance to the extent of the sale, and that the purchaser assumed the risk thereof, and there is no proof to defeat this presumption. The price paid for the land is not shown to have been a full equivalent, and the deed is with special warranty, evidently evincing the intention of the grantor only to convey such title as was in himself, and thus limit his liability for some known reason, the only apparent one being this dower charge. The dower already being a charge on the land, it was unnecessary to reserve the same in the deed. Nor was there any writing necessary in the case to avoid the statute of frauds; but a simple understanding between the vendor and vendee, recognized in fixing the amount of consideration, was all that was required. If the appellant had joined in the deed, she would have released her dower, and that she did not tends to show that a release was not intended or considered. She joined in the deed for the two-thirds, and thus relieved it, but this does not relieve the other, in absence of intention to do so. It seems therefore apparent that the *prima facie* case is with the appellant, and the creditors have failed to rebut it.

But, in addition to this, the case was referred to a commissioner, and he reported in favor of appellants's right of dower. The creditors excepted, and the court sustained the exception. Neither the commissioner's report nor the evidence on which it is founded is a part of the record. It has been repeatedly held by this Court that a Commissioners report will be taken as conclusive as to any finding that might be affected by extraneous evidence, when the evidence on which it is founded is not made a part of the record, the court presuming that the evidence, if produced, would sustain such finding. *Thompson v. Catlett*,

24 W. Va. 524; *Lynch v. Henry*, 25 W. Va. 416; *Chapman's Adm'r v. McMillan*, 27 W. Va. 20. The court sustained the exception to the commissioner's report, it is true, but it apparently did so on legal grounds, without regard to any extraneous evidence that might have been heard by the commissioner. In the case of *Chapman's Adm'r v. McMillan*, it is held, in substance, that, where the evidence is not returned with a commissioner's report, exceptions taken thereto will be regarded as made for errors appearing on the face of the report, and which may not be affected by extraneous testimony. Counsel intimate in argument that no extraneous testimony was taken with regard to the point in issue, but, as this does not appear in the record, we must presume that the commissioner heard such extraneous testimony as was necessary to sustain his finding. So, in either view of the case, the court erred in sustaining the exception to the commissioner's report in so far as it found the appellant entitled to dower in the land, and for this reason and to this extent the decree is reversed and cause remanded.

Reversed.

CHARLESTON.

McCLAUGHERTY v. CROFT.

(ENGLISH, PRESIDENT, *dissenting*).

Submitted January 25, 1897—Decided April 7, 1897.

1. *VENDOR'S LIEN—Enforcement of Lien—Prior Liens—Parties.*

In a suit to enforce a purchase-money lien reserved in a deed conveying legal title, with only covenant of general warranty, it is not necessary to make prior lienors, holding liens against the property, parties, nor to refer the case to ascertain such liens, unless it appear that the vendor is insolvent. But if the plaintiff in his bill shows such liens, and proposes to have the purchase money go to discharge them, the owners of such prior liens must be parties. (p. 272.)

2. *VENDOR'S LIEN—Enforcement of Lien—Prior Liens—Reference.*

In a suit to enforce a purchase-money lien reserved in a conveyance containing a covenant for further assurance, and

43	270
44	401
45	525
45	557
43	270
50	807
50	810
43	270
51	492
52	531
43	270
58	169
43	270
59	143
43	270
66	192
66	195
66	230
66	233

one of general warranty, where prior liens appear, the plaintiff cannot have a decree for his debt until such liens be removed. If such liens appear of record unreleased, and be not shown discharged or barred, the vendor is entitled, if he asks it, to a reference to ascertain whether they yet exist. (p. 274.)

3. *VENDOR'S LIEN—Enforcement of Lien—Deed of Trust—Decree—Parties.*

Though, when suit was brought to enforce a vendor's lien, the land was under a prior lien by deed of trust, making the trustee and creditor necessary parties, yet where, pending it, the trust has been released by release, revesting legal title in the owner, decree may be made, without making such trustee and creditor parties. (p. 275.)

4. *DECREE—Defective Title—Prior Liens.*

If, at the date of a decree selling property for purchase money, the title, though defective, because of prior lien or otherwise, has become clear of lien and good to the purchaser, the court may go on to decree to enforce the contract. (p. 275.)

5. *STATUTE OF LIMITATIONS.*

Plea of the statute of limitations is generally personal to the party, and not available to strangers; but privies in estate, as heirs, devisees, vendees, or mortgagees of the property, may use it to defend their property. (p. 275.)

6. *STATUTE OF LIMITATIONS — Judgment Creditor — Living Debtor.*

Question: Can one judgment creditor of a living debtor plead the statute of limitations against another? (p. 276.)

Appeal from Circuit Court, Mercer County.

Bill by D. W. McClaugherty against D. N. Croft. Decree for plaintiff, and defendant appeals.

Reversed.

W. W. McCLAUGHERTY and D. E. JOHNSTON, for appellant.

S. L. FLOURNOY, for appellee.

BRANNON, JUDGE:

McClagherty brought a suit in chancery against Croft to sell one undivided fourth in a town lot, to pay a balance of purchase money, for which a lien was reserved upon the property in the deed conveying it. Croft answered, setting up a deed of trust and numerous judgments against McClaugherty, as prior liens, as defense to the suit, and asking that the lienors be made parties, and that the money

in his hands be applied to discharge them, particularly a judgment of Straley & Co. against McClaugherty. The court refused to require the lienors to be made parties, or to ascertain liens by reference, and decreed the debt to McClaugherty without making provision for its application on any lien, and directed the property to be sold. Croft appeals.

This is not a case to sell land for purchase money under an executory contract not carried into execution by conveyance of the legal title, but is a suit to sell land for purchase money, under a lien reserved in a conveyance, and different principles apply in the latter case. In the former a court will not compel an unwilling purchaser to accept a title, unless it is clear, reasonably free from adverse claim or incumbrance; but in the latter the contract has been executed by the parties, the purchaser has agreed to take the land with the covenant of general warranty, thus agreeing to pay unpaid purchase money, and to risk the solvency of the warrantor in case he shall lose his land. Our cases have relaxed this rule of English equity, our rule being that a vendor cannot compel payment of the purchase money if the title be shown to be defective, or a suit to recover or subject it to a lien be pending, or a suit be threatened, or there be an actual incumbrance, and the vendor be insolvent. I understand that the vendor's insolvency is an indispensable element to enable the vendee to resist payment. It seems unreasonable to compel the purchaser to pay out the money, and run the hazard of the vendor's future insolvency, where actual liens are shown; but if the purchaser took a covenant of general warranty, and no covenant against incumbrances or other covenant, it is so. *Wamsley v. Stalnaker*, 24 W. Va. 214; *Neely v. Ruleys*, 26 W. Va. 686; *Kinports v. Rawson*, 29 W. Va. 487 (2 S. E. 85); *Heavner v. Morgan*, 30 W. Va. 345 (4 S. E. 406); *Faulkner v. Davis*, 18 Grat. 660. But I do not think this case is governed by principles announced in those cases. In the *Wamsley-Stalnaker Case* it would appear from Judge Greene's language "that there was no showing at all towards the insolvency of the vendor, or that any suit was brought or threatened to subject the land to the payment of the judgments set up by the defendant, nor in any single fact stated in the bill that tended in any

degree to show that there was the least probability that any suit would be brought to subject the land to any of the judgments; and the evidence shows that there was not the least probability of it, and it shows, indeed, that it was impossible that the land could ever be subjected to the payment of any of the judgments, there being lands liable to be first subjected, greatly exceeding the value of the judgments." How different this present case! The defendant alleged that his purchased land was in danger to answer a large judgment greater than the money in Croft's hands, which the plaintiff's bill admitted to be unpaid. Plaintiff's bill admitted this large judgment, and stated that the plaintiff himself desired the purchase money due from Croft to be paid for the very purpose of satisfying the large judgment which the bill specified as existing as a lien thereon, thereby virtually saying that the plaintiff had no other lands, or indeed any property or estate to discharge that very considerable judgment. Otherwise, why the necessity of calling upon the defendant for its payment? There was no affirmative charge of insolvency, it is true, in the bill; but we may say, by strong implication, that the defendant was not unquestionably, as in the *Wamsley Case*, able otherwise than through this debt to discharge that judgment. And, as the bill itself asked the payment of this debt by Croft to go on that judgment, it showed an interest in the judgment creditor, calling upon the plaintiff to bring him before the court, in order that the proper amount due might be judicially fixed, to the safety of the defendant, and in order that the money might be paid into his hands. Without his presence, how could the court do this? How could the proposition of the bill to pay this judgment be carried out without his presence? Instead of bringing him before the court, and decreeing the proper amount into his pocket in discharge of that judgment, the court decreed it into the pocket of the plaintiff, without provision for its discharge: and we think that the court ought to have made him a party. We think, under the covenant of general warranty, that should have been done, under the particular circumstances shown by the bill in this case. We do not intend to impugn the cases cited above at all. We only say that we think this present case, on the showing made by the bill, called for the presence of this creditor.

But there is another important feature in this case. The deed contains a covenant for further assurance, and it bound the vendor to a conveyance free of incumbrance, and he cannot enforce payment of purchase money without clearing up incumbrances. Code 1891, c. 72, s. 18; Rawle, Cov. §§ 104, 105; 19 Am. & Eng. Enc. Law, 984; 2 Minor, Inst. 721. It requires the removal of judgments. 2 Lomax, Dig. 272. Certainly, the removal of incumbrance is a thing necessary to assure and make good the property sold. Rawle, Cov. § 98, says that the importance of this covenant to the purchaser can hardly be over-stated. The remedy, indeed, by action at law for damages, is one seldom sought, and the reported cases are few: but, whatever may be the doubt of a purchaser's right to the specific enforcement by a court of equity of the other covenants for title, there is little or none with respect to that for further assurance. And equity will entertain a suit to specifically enforce this covenant. *Nelson v. Harwood*, 3 Call, 342. Rawle (in section 62) says: "As to the covenant for further assurance, the rule is somewhat different. It is not a mere allegation that the title is good; that there is no incumbrance; not a mere promise to respond in damages. It is a specific undertaking to execute such particular deed or deeds as may be necessary for the better and further assurance of title to the purchaser. If performed, it may make a doubtful title marketable. If unperformed, who can measure the damages to be recovered at law? Who can measure by money the difference between the value of a good title to keep, and yet not good to sell? Hence, it will be found that, from an early day, courts of equity have enforced the specific performance of covenants for further assurance." This covenant ought to be given as much force as the special provision in the bond for purchase money, in addition to general warranty, was given by Judge Allen in *Peers v. Barnett*, 12 Grat. 417. Here it is in the deed itself.

I do not concede the idea that it is consistent with proper practice to provide for the application of the money to liens by later decree. If the creditor ought to be a party, or a reference is necessary, it ought to be before decree, because the decree ought to fix the amount due him so as to bind him, so the debtor and creditors will know what

the property is to raise. A volume of cases tell us that, where this is necessary, it ought to be before a decree of sale. In this case the answer asked the removal of liens appearing of record, some surely unpaid; and it prayed that the purchase money yet owing be applied thereon, and that the answer be taken as a cross bill, and all relief proper on its facts be decreed. It was error to decree that purchase money into the pockets of the plaintiff, instead of making Straley & Co. parties, and applying the money to the discharge of their debt. Where judgments appear as liens under a covenant of further assurance, I do not see how the plaintiff can avoid making their owners parties, unless they are shown to be paid, or appear barred by limitation. Most of these judgments appear barred, and though the plea of limitations is generally personal to the debtor, and cannot be used by a stranger, yet I think one who is his privy in estate, as an heir or devisee, grantee, or mortgagee, may defend his property with such plea. *Werdenbaugh v. Reid*, 20 W. Va. 588; *Shipley v. Pew*, 23 W. Va. 487; 13 Am. & Eng. Enc. Law, 710; 1 Wood, Lim. § 41; Busw. Lim. 527. All these judgments save one appeared barred and paid, and for that reason I see no error in not making their owners parties. The judgment of Straley & Co. remained unpaid. I do not see how Croft was in default.

When this suit was brought, the property was subject to a prior deed of trust, making it necessary that the trustee and creditor under it be parties. *Turk v. Skiles*, 38 W. Va. 404 (18 S. E. 561). But pending suit a formal common-law deed of release by trustee and creditor was made and recorded, releasing and revesting in the owner the legal title, and thus removing the lien. This rendered their presence as parties unnecessary. Such would, I think, be the effect also of a statutory recorded release, under section 4, chapter 76, Code 1891. Though a title be defective at the commencement of a suit, yet if, pending it, it become free of lien, or clear, so as to be good to the purchaser, the court may go on to decree. *Core v. Wigner*, 32 W. Va. 277 (9 S. E. 36); *Peers v. Barnett*, 12 Grat. 410. For this reason there was no need of an amended bill. There is no error in closing or reading the depositions of plaintiff. Defendant had ample opportunity for cross-examination.

I do not now say whether one judgment lienor can plead the statute against other lienors of a common living debtor. It is not necessary to say here how this is. He is a general lienor, while a mortgagee is a lienor on that particular property. It was left open in the opinion in *Woodyard v. Polesley*, 14 W. Va. 211, and in *Lee v. Feamster*, 21 W. Va. 111, and *Conrad v. Buck*, Id. 411.

ENGLISH, PRESIDENT (*dissenting*):

This was a suit in equity brought in the Circuit Court of Mercer county by D. W. McClaugherty against D. N. Croft. The bill alleges: That the plaintiff sold to the defendant one-fourth of what is known as the "Rideout Property," consisting of a house and lot on Bland street, in the city of Bluefield, Mercer County, W. Va., for the sum of one thousand dollars. That the defendant paid three hundred dollars in cash at the time of the purchase, and assumed a small balance of purchase money against said property, and executed two bonds to plaintiff for the remaining part of the purchase money, one of which was due on the 1st day of October, 1893, and the other would be due on the 1st day of April, 1894, the 1893 bond being for the sum of two hundred and eighty four dollars and thirty-eight cents, and the 1894 bond for the sum of three hundred and thirty-three dollars, copies of which bonds were filed and exhibited as part of the plaintiff's bill. That at the time of the purchase the plaintiff executed to the defendant a deed reserving a vendor's lien on the property for the remaining part of the purchase money (as evidenced by the bonds above referred to), a certified copy of which deed was also exhibited and made part of the plaintiff's bill. That at the time he sold this property to the defendant there were two judgments docketed against him on the judgment lien docket in the clerk's office of the county court of Mercer county, which had not been paid or payment provided for, one of which was in favor of Straley & Co., for the sum of nine hundred and sixty-six dollars and sixty-nine cents, and twenty-one dollars and fifty-five cents costs, the other in favor of W. H. Hoge for the sum of five hundred and forty-six dollars and seven cents, and fourteen dol-

lars costs, both obtained on the 12th day of January, 1898. That, to procure money to pay the last-named judgment, plaintiff sold the bonds above mentioned to J. H. McClaugherty, and with the proceeds paid said judgment, after which he purchased said bonds from J. H. McClaugherty, and they are now for plaintiff's benefit, as is shown by the indorsements thereon. The plaintiff further says that he is anxious to collect said bonds, and wishes to have the proceeds applied to the payment of the first above referred to judgment, and he prays that said property may be sold to pay off his vendor's lien thereon, and to apply the sum arising therefrom to the payment of the above-mentioned judgment, and for general relief.

The defendant, D. N. Croft, demurred to the plaintiff's bill, and also filed his answer, in which he states, among other things: That on the 29th day of April, 1889, Joseph I. Doran and wife, by deed of that date, conveyed to one W. A. Rideout the lot in controversy in this suit; and that the said Rideout, to secure certain deferred payments of the purchase money therefor, executed to one William G. McDowell, trustee, a deed of trust on said property (the wife of said Rideout joining in said trust deed), which trust deed bears date the 19th day of April, 1889, and is duly recorded. That said W. A. Rideout and wife afterwards sold said property to John K. Peck & Co., and that a part of the consideration of said purchase of said parties from said Rideout was the assumption by said parties of said trust deed of said Rideout and wife above set forth. That afterwards the said John K. Peck and wife conveyed to R. C. McClaugherty, N. H. McClaugherty, and D. W. McClaugherty a one-fourth interest in said property to each, being the three-fourths undivided interest therein. Afterwards the said John K. Peck sold his undivided one-fourth interest in said lot to R. C. McClaugherty, the said R. C. McClaugherty in said purchase from said Peck assuming said Peck's part of said trust deed, and that afterwards said D. W. McClaugherty sold his undivided one-fourth interest in said lot to the defendant, and that the amount assumed by defendant is shown in the deed to him, and is part of the purchase money so recited to be paid by said W. A. Rideout to Joseph I. Doran, which is secured by said deed of trust of said Rideout and wife:

and that, when the defendant purchased said interest from plaintiff, the plaintiff, in pursuance of his agreement, conveyed the same to him with covenants of general warranty of title to said interest. That the said trust deed so executed by said W. A. Rideout and wife on said lot has never been paid off and discharged, and that said Joseph I. Doran and the trustee in said deed of trust are necessary parties to this cause, and should be made such for a full determination of the matters in the cause; and that the said N. H. McLaugherty, R. C. McLaugherty, and John K. Peck, and their respective wives, should be made parties to the cause, and that said W. A. Rideout is a necessary party to the cause. He then sets out a number of judgments rendered at different dates, in favor of different parties, which appear on the judgment lien docket, which judgments he alleges were on said judgment lien docket before the execution of said deed from plaintiff to defendant for said interest in said lot or property, and all of said judgments were on said judgment lien docket at the time of the maturity of the bond or note sued on in this cause, and are still on said docket, and so far as the records of said office of said clerk show, and so far as defendant knows, none of said judgments have ever been satisfied, in whole or in part. Said defendant further says that he offered on the 14th of November, 1893, to pay off the bond then due, if he was in some way secured and made harmless of said liens, but this proposition was declined. He says, further, that he is able, willing, and ready to pay off said bonds, but cannot do so on account of said liens, and that he brings into court and tenders the amount of the said bonds so sued on in payment of said bonds, upon the condition that the said plaintiff be first required to pay off and discharge the balance of said liens against said interest in said property, and that said plaintiff do first do same, and he prays that plaintiff be required to so do; that he ought not to be required to pay any of the purchase money until all of said liens are satisfied, and he prays that a decree be entered compelling plaintiff to pay off all of said liens, or so much thereof that the amount of said bonds will discharge the balance of said liens, and save defendant harmless in the payment of said liens or said bonds, and that he be not required to pay the

costs of the suit, that his answer be taken and treated as a cross bill against the plaintiff, *etc.*

The plaintiff filed a special replication, putting in issue the allegations therein contained in the nature of a cross bill, which sets up affirmative matter or asks for affirmative relief. Depositions were taken in the cause, which were excepted to on the ground of want of sufficient notice, and on the 28th day of May, 1895, the cause was finally heard, the exceptions to the depositions were overruled, and the court, being of opinion that the plaintiff was entitled to the relief prayed for, proceeded to enforce the vendor's lien against the interest in said lot sold by plaintiff to D. N. Croft, ascertained the amount of said lien to be six hundred and ninety-seven dollars and thirty-three cents decreed against the defendant for that amount, with interest from the date of the decree, and directed that unless said amount, with interest and costs, was paid in twenty days, a special commissioner therein appointed should advertise and sell said interest in the lot aforesaid in the manner and upon the terms therein prescribed; and from this decree the defendant D. N. Croft obtained this appeal.

The first assignment of error relied on by the appellant is as to the action of the court in refusing to dismiss the plaintiff's bill on motion for the want of a proper order of publication in said cause, and upon the further ground of variance between the purposes of the suit as set out in the order of publication filed with the bill of plaintiff and the purposes set out in the bill. Referring to the order of publication, it appears that the object of the suit therein set forth is to enforce a vendor's lien in favor of the plaintiff, D. W. McLaugherty, against the defendant, D. N. Croft, reserved on an undivided one-fourth interest in a house and lot situated in the city of Bluefield, Mercer county, W. Va., known as the "Rideout Property," which vendor's lien amounted to about the sum of six hundred and sixty-five dollars and for general relief. This assignment of error does not appear to be relied on by the appellant in his brief, and, so far as we can see, there appears to be no defect in the order of publication, and it is presumed to have been waived.

The next point of error assigned and relied upon is the

action of the court in overruling the defendant's demurrer to the plaintiff's bill. As a ground of demurrer, it is suggested that in the purchase of the Rideout property, as appears from the allegations of the bill, the defendant assumed a small balance of purchase money against said property, but that the bill does not state to whom, and the party to whom this was to have been paid should have been made a party defendant to the cause. It does, however, appear from other portions of the record that said purchase money was due to Joseph I. Doran, and that the said property was conveyed to William G. McDowell, trustee, to secure the payment of the same; and it further appears that on the 28th day of March, 1895, a deed releasing said trust was executed and acknowledged by William G. McDowell, trustee, and Joseph I. Doran, in which they acknowledged the payment of the entire debt secured by said deed of trust, which release was duly recorded in the county court clerk's office of Mercer county on the 3rd day of May, 1895, and the decree complained of in this cause was not entered until the 28th day of May, 1895. In the case of *Core v. Wigner*, 32 W. Va. 278 (9 S. E. 36) (second point of syllabus), this being a suit to enforce the payment of purchase money under an executory contract, it was held that if at the date of the decree of sale the title, though originally defective, has become good by reason of the purchaser's possession under the statute of limitations, the court may go on to enforce the contract. In the case under consideration, the trust lien to secure said purchase money having been released before the decree complained of was rendered, there was no need of amending the bill by making Doran and McDowell parties. It is, however, claimed that the plaintiff should have been compelled to amend his bill by making all the lien creditors of the plaintiff parties to the suit. Was this necessary? It is contended that the members of the firm of Straley & Co. were necessary parties to the suit, for the reason that they had a considerable judgment against the plaintiff, D. W. McClaugherty, and it was error to decree a sale of the property without making them parties and without providing in advance for the payment of said judgment. Now, it is true that this judgment existed against the plaintiff, and was docketed before the plaintiff sold said

interest in said lot to the defendant; but it is also true that the defendant had notice of its existence, and yet he purchased the property, paid the cash payment of three hundred dollars, and executed his notes for the deferred payments of the purchase money, and accepted a deed containing a reservation of the vendor's lien to secure the deferred payments. It is true that the deed from D. W. McClagherty and wife to D. N. Croft contains a covenant for further assurances of title, the effect of which is set forth in section 18 of chapter 72 of the Code; but nothing is claimed in the pleadings by reason of this covenant, the defendant in his answer making no reference to said covenant and claiming nothing by reason thereof. It in no manner appears or is alleged that the plaintiff is insolvent, or that he is not the owner of other real estate than that mentioned in the bill. A vendor's lien is different from a judgment lien in this: that a judgment lien bears equally on all the real estate of the defendant, while the vendor's lien only rests upon the particular property sold by the vendor. The mere fact of the existence of judgment liens against the lands of a vendor will not prevent him from enforcing his vendor's lien against a purchaser from him, unless it affirmatively appears that he is insolvent, or has no other lands sufficient to satisfy the judgment liens against him. If it were otherwise, a vendor seeking to enforce his vendor's lien against a purchaser would be compelled to pay off all judgment liens against him before he could collect his purchase money, although he may have been endeavoring to collect it for the express purpose of paying off such liens. So in the case of *Necley v. Ruleys*, 26 W. Va. 686, this Court held that, "in a suit to enforce a vendor's lien, it is not error to decree a sale of land on which the lien for the purchase money is reserved, without other lienors being made parties, and the amount and priorities of their liens settled"; also that, "in a suit to enforce a vendor's lien, the defendant filed an answer averring there were many judgment liens against the plaintiff's lands, and that he did not have other lands, besides the tract sold the defendant, sufficient to discharge said liens, but did not aver that the plaintiff was insolvent. The court did not err in refusing to set aside an order of sale on this ground, nor in refusing to send the cause to a com-

missioner to inquire into the matters set up in the answer." So, also, in the case of *Wamsley v. Stalnaker*, 24 W. Va. 215 (third point of syllabus), where the same was held in substance as was subsequently held in the case of *Core v. Wigner*, *supra*. See, also, the case of *Arnold v. Coburn*, 32 W. Va. 272 (9 S. E. 21), where it is held that, "in a suit to enforce a vendor's lien on land, it is not error to decree a sale of such land to pay said lien, without making other creditors having subsequent liens thereon parties, and ascertaining the amounts and priorities of their debts." SNYDER, JUDGE, in the opinion says: "This Court has repeatedly decided that, in a suit to enforce a vendor's lien, it is not error to decree a sale of the land on which such lien exists before ascertaining the amounts of other liens on the land and their priorities, because in such suit the doctrine which requires all the lienors in ordinary creditors suit to be made parties does not apply." From these authorities it is manifest that it was unnecessary to make those holding judgment liens against the lands of plaintiff parties to the suit, and that the court committed no error in overruling the defendant's demurrer, and the court did not err in refusing to require the plaintiff to amend his bill by making the lien creditors of the plaintiff parties to the suit.

The fifth error assigned and relied on by the appellant is as to the action of the court in overruling the motion of the appellant to quash and suppress the deposition of the plaintiff taken on his behalf, and in not sustaining said motion and the exception of appellant to said depositions. Now, it appears that an agreement was entered into in writing between the plaintiff, D. W. McClaugherty, and W. W. McClaugherty, attorney for the defendant, D. N. Croft, that in the chancery suit of said D. W. McClaugherty against D. N. Croft, the depositions then being taken on behalf of the plaintiff were to be left open until a future day, to be agreed upon by the parties thereto, or until they could get together and finish the same; and that, after the same were finished, then, if the said D. N. Croft desired to take any depositions on his part, he should have the right to do so, and that the hearing of the cause was not to be objected to on account of said depositions of said plaintiff and those on behalf of said D. N. Croft not having

been taken before the next term of court or during the term of the court. Now, it appears from the deposition of D. W. McClaugherty that in pursuance of this agreement, he requested W. W. McClaugherty, at least a half dozen times during eight days, to finish up the depositions, part of which time he was doing nothing, and each time he refused directly and indirectly to finish them; and the agreement being that they were to be finished before that term of the court, said witness living in the town of Princeton, where the deposition was being taken, the deposition was subscribed and closed, and at 5 p. m. the attorney for the defendant appeared and asked to proceed with the cross-examination of said witness, and the witness refused to appear, and the deposition was excepted to by defendant, and said exceptions were overruled by the court, and, under the circumstances, I think properly overruled. The fact that said deposition was read did not in any manner prejudice the defendant, for the reason that it relates exclusively to liens, by judgment and otherwise, created against the plaintiff prior and subsequent to the sale of said real estate to defendant, all of which were released before the date of the decree complained of; and if the defendant's motion had prevailed, and said depositions had been suppressed and excluded, the plaintiff would still have been entitled to the decree complained of for these reasons. My opinion is that the decree complained of should be affirmed, with costs and damages to the appellee, and I cannot concur in the opinion of the majority of the Court.

Reversed.

CHARLESTON.

NEWLON *et al.* v. WADE *et al.*

Submitted January 30, 1897—Decided April 7, 1897.

1. EXECUTION—*Return of Execution.*

Point 7 of the syllabus in the case of *Findley v. Smith* 42 W. Va. 299, is approved. (p. 285.)

43	283
46	21
43	283
52	47
43	283
63	565
43	283
165	80

2. **EQUITY JURISDICTION—*Judgment of Justice—Collateral Attack.***

A judgment of a justice founded on a sufficient summons cannot be collaterally attacked in equity on the ground alone that the cause of action arose in another county, the place of the defendant's residence. Such question is purely legal, and does not give equity jurisdiction to review such judgment. (p. 286.)

3. **JUDGMENT LIENS—*Enforcement of Liens—Real Estate.***

A judgment debtor's real estate cannot be decreed for sale to pay the judgment liens thereon until such real estate has been properly ascertained, and it appears to the court that the rents and profits thereof will not satisfy such liens within five years. (p. 287.)

4. **EQUITY PLEADING—*Answer—New Matter.***

Material allegations of new matter in an answer constituting a claim for affirmative relief, not controverted by a special reply in writing, shall for the purposes of the suit be taken as true, and no proof thereof be required. (Code, c. 125, s. 36. (p. 288.)

Appeal from Circuit Court, Braxton county.

Bill by C. K. Newlon and another against L. M. Wade and others. Decree for plaintiffs, and defendant Wade appeals.

Reversed.

JOHN B. MORRISON, for appellant.

MOLLOHAN & McCLINTIC and W. E. R. BYRNE, for appellees.

DENT, JUDGE:

C. K. Newlon filed a creditor's bill in the Circuit Court of Braxton county to enforce judgment liens against the real estate of L. M. Wade. Such proceedings were had that, after reference and report of commissioner, a certain house and lots in the town of Sutton, being a small portion of defendant's property, were decreed to be sold to pay various liens ascertained against the same. From this decree the defendant Wade appeals, and the errors relied upon by him are contained in the exceptions to the commissioner's report, which are in short as follows:

1. That the two nominal plaintiffs in the suit, Newlon and Mansbach, had no right to maintain the same, for the reason that the executions issued on their judgments had

not remained in the officer's hands sixty days before he made the return thereon of "No property found," and that the suit was therefore prematurely instituted. This question was settled contrary to the appellant's pretensions in the case of *Findley v. Smith*, 42 W. Va. 299 (26 S. E. 370). This would not prevent the debtor showing the return to have been made falsely and collusively, in avoidance of the statute, to enable the plaintiff to institute chancery proceedings without exhausting the debtor's personal estate. The circuit court erred, therefore, in sustaining the demurrer to the bill, but as this error was cured by the final decree in favor of plaintiff's it is not ground for reversal. As to allowing other creditors to be made plaintiffs and carry on the suit, there was no error committed. *Lewis v. Laidley*, 39 W. Va. 422 (19 S. E. 378). A surety who has paid a debt, for which he is bound with others, is entitled to be subrogated to all the rights of the creditor against either the principal debtor or co-sureties, to the extent of their liability. *Hacker v. Moore*, 40 W. Va. 49 (20 S. E. 848); *McNeil v. Miller*, 29 W. Va. 480 (2 S. E. 335). This applies to the demurrer of the appellant to the amended bill, and to his tenth exception to the commissioner's report.

2. A justice of the peace has jurisdiction throughout his county both by the Constitution and statute, and, while he is required to reside in the district for which he is elected, he is authorized to hear and determine cases in other districts of the county. This applies to exception sixth.

3. The seventh and eleventh exceptions, being as to insufficiency of notice, and also the first exception as to the thirty-five dollars credit on C. K. Newlon's judgment, if not waived by the appellant, may be properly cured in the further progress of the cause, as it will for other reasons have to be recommitted to the same or another commissioner.

4. The various objections to the judgment of J. P. Cole are not well taken. The appellant does not deny having been duly served with process to appear before Justice Oliver in the county of Lewis. But his objections are that the process was served by a special constable. This is provided for under section 30, chapter 50, Code. That

the return does not show that it was served in Lewis county: This is a presumption of law, it not otherwise appearing. That the cause of action did not arise in Lewis county: This is settled by the justice's judgment. The appellant, having notice, should have appeared and objected to the want of jurisdiction. Not doing so, he waives the same, and is bound thereby, unless it should clearly appear to the contrary on the face of the record. Justices' courts are a part of the judiciary system of this State, with extensive jurisdiction, and their process and judgments are entitled to the same respect, to the extent of jurisdiction, as other tribunals; and he who neglects such process when duly served on him must endure the consequences of his own negligence. If the appellant had a good defense by reason of the cause of action, or any part thereof not arising in the county, he should have appeared and presented it, and, having failed to do so, he can only be relieved therefrom collaterally on equitable grounds, such as fraud, accident, mistake, surprise, or some adventitious circumstance beyond the control of the party. *Hubbard v. Yocum*, 30 W. Va. 740, (5 S. E. 867); *Knapp v. Snyder*, 15 W. Va. 434; *Freem. Judgm.* (3d Ed.) § 524.

5. The most important question raised is as to whether the commissioner erred in not ascertaining all the real estate of the appellant, and the annual rental value thereof. On the coming in of the commissioner's report, the demurrer of appellant was sustained to the bill, and it was amended by making new parties plaintiff therein. Appellant then filed his answer, in which he alleged that he was the owner of certain real estate, situated in both Braxton and Gilmer counties, which was subject to the lien of the various judgments in suit, and also that the vendor lien holder was not asking for a sale of the real estate alone included in the commissioner's report, and praying that his said real estate, with the rental value, should be ascertained, and that the same be rented for the payment of the judgments. The appellees claim that it was the duty of the appellant to show before the commissioner the real estate owned by him, and also to show that the rental value thereof was sufficient to pay the judgment in five years, and his failure excuses the court for noncompliance

with the statute. In support of this contention they rely on the cases of *Duncan v. Custard*, 24 W. Va. 730; *Hill v. Morehead*, 20 W. Va. 429, and *Rose v. Brown*, 11 W. Va. 122. These cases were all decided under the common equity rule prevailing before the enactment of the Code of 1849, as determined by the Virginia court of appeals in the cases of *Manns v. Flinn's Adm'r*, 10 Leigh, 93, and *McClung v. Bierne*, *Id.* 394, and they were all prior to the adoption into the Code of this State of the provision that "if it appear to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to sale." This provision was in the Codes of Virginia of 1849 and 1860, but was dropped from the Code of West Virginia of 1868, and reinserted in the Acts of 1882 (chapter 126). Under this provision, before the court can decree a sale of a judgment debtor's property to pay the judgment liens thereon, the full amount of property subject thereto must be ascertained, and it must appear to the court that the rents and profits thereof will not pay the judgments within five years. Nor does it devolve upon the judgment debtor to show such to be the case, but it is the duty of those seeking a sale of the land to show the necessity therefor, and it is the duty of the commissioner to ascertain and report all the real estate of the judgment debtor liable to payment of judgments against him, and the report should show on its face the discharge of this duty, and not simply report the real estate mentioned in the bill. The records of the county and all other means, even to the testimony of the judgment debtor, may be resorted to by him to ascertain the truth. In the case of *Horton v. Bond*, 28 Grat. 815, the court of appeals of Virginia, in considering the provision of the statute now under consideration, held that "upon a bill by a judgment creditor, to subject the lands of the principal debtor and his sureties to satisfy the judgment, before there can be a decree for the sale of the lands it must be made to appear to the court that the rents and profits of the lands in five years will not discharge the judgment. This may be shown by the pleadings, by the admission of the parties, by evidence taken, or by a report of a commissioner on an inquiry ordered." The appellant in his answer asked that

the matter be ascertained, but the court declined to do so, being misled by the foregoing cases not applicable.

The bill alleges that the defendant is the owner of a certain piece of real estate, but does not allege that it is all the real estate owned by him, or that the rents and profits thereof will not pay the judgments against the same within five years. The commissioner was directed to ascertain the real estate of the judgment debtor, but he does not show in his report that he discharged his duty in this respect. He follows the bill. The judgment debtor excepts for the reason that the commissioner failed to report all his real estate, and suggests that the records of the county so disclose. It is not right that a judgment debtor should be harassed by repeated sales of different portions of his real estate, especially if it all will produce rent sufficient in five years to pay off the judgment liens, and therefore the full extent, together with the rental value thereof, should be ascertained, before a decree for rent or sale thereof is entered. The appellees say that there is no sufficient evidence that the judgment debtor owns other real estate, that the only place that it appears is in the judgment debtor's answer, to which there is a general replication.

Prior to the present statutory provisions relating to the enforcement of judgment liens, the right to have his land rented rather than sold was a privilege accorded to the judgment debtor when asked by him, and a matter of right demandable at any time. *Arnold v. Casner*, 22 W. Va. 444, cited. But now it is a condition precedent to the sale of lands for the satisfaction of judgment liens that the real estate—that is, all the debtors real estate liable to such judgment liens—will not produce rent sufficient within five years to extinguish such judgment liens, and this must affirmatively appear in the pleadings, proofs, or proceedings, and hence it is unnecessary for the judgment debtor to ask such relief affirmatively. If the plaintiff had alleged in his bill that the real estate set out therein was all the real estate owned by the judgment debtor, and that the rental value thereof was sufficient to satisfy the judgment liens in five years, the appellant could have controverted the same by a mere denial, which would have cast the burden on the plaintiff of sustaining

the controverted allegation. And the mere fact that he omits it from his bill, and appellant affirmatively alleges the contrary in his answer, does not shift the burden to the appellant, for the plaintiff must make it appear to the satisfaction of the court that the rents and profits of all the appellant's real estate liable to the judgment liens will not satisfy such liens within five years before he can demand a sale thereof. Under the circumstances shown by the pleadings and proofs in this case, the circuit court erred in not recommitting the same for the purpose of ascertaining all the real estate of appellant, with the liens and their priorities against the same, and the true rental value thereof, and for this error the decree complained of is reversed, and the cause is remanded for further proceedings according to the rules and principles of equity.

Reversed.

CHARLESTON.

RANDOLPH v. CASEY.

Submitted February 1, 1897—Decided April 7, 1897.

ADVERSE POSSESSION—Color of Title—Void Deed—Statute of Limitations.

Possession under a void deed is sufficient to give color of title as against the grantors, and to set in motion the statute of limitations, and the coverture of the appellant, who was the grantor, does not affect the question (*Irey v. Markey*, 132 Ind. 546 (32 N. E. 309)), she being excepted from the disabilities mentioned in section 3, chapter 104, Code, as to her sole and separate property. (p. 293.)

Error to Circuit Court, Harrison county.

Action by Fenton F. Randolph against Patrick Casey. Judgment for defendant, and plaintiff brings error.

Affirmed.

JOHN BASSELL, for plaintiff in error.

J. J. DAVIS and HUTCHINSON & CAMDEN, for defendant in error.

43	289
45	658
46	659
43	289
52	122
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58	128
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80	292
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163	627
63	629
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64	112
43	289
66	147

McWHORTER, JUDGE :

On the 8th day of July, 1870, Fenton F. Randolph and wife conveyed by deed to Nancy J. F. Randolph a tract of forty-six and one-half acres of land in Harrison county; and on the 25th of February, 1880, said Nancy, together with her husband, Daniel F. Randolph, by deed conveyed a small portion of said tract (eighteen and two-fifths rods) to P. C. F. Randolph, in consideration of one hundred dollars paid, and placed said vendee in possession thereof. The land was placed on the land books in the name of the vendee, and taxes paid by him, and the property improved, occupied, and enjoyed by him up to the time of his death, in May, 1889, after which his widow and children remained in possession until March, 1891, then renting the same to Patrick Casey, who occupied as the tenant of the estate of P. C. F. Randolph, deceased, paying the rent to the estate of decedent until legal proceedings were had resulting in the sale of said property under decree of the court for the payment of debts of decedent's estate, at which judicial sale said Casey became the purchaser and continued in possession. At December rules, 1893, Nancy J. F. Randolph filed her declaration in ejectment in the circuit court of Harrison county against Patrick Casey, to recover said eighteen and two-fifths rods of land. On the 16th of January, 1894, the defendant put in his plea of not guilty. On the 28th of September, 1894, a jury was impaneled to try the issue, and, after hearing the evidence, by consent of the parties a juror was withdrawn, and the jury from rendering a verdict discharged, and by consent the whole matters of law and fact arising in the case were submitted to the court. On the 1st day of October, 1894, the court having heard the argument of counsel upon the matters of law and fact in the case submitted to the court as aforesaid, the court found that the plaintiff take nothing by her complaint, and discharged the defendant with costs, to which the plaintiff excepted.

It appears that there is but one error assigned; that is, that the court held that the plaintiff was barred by the statute of limitations and that the court, upon the facts stated in the record, should have rendered judgment in favor of the plaintiff, and not for the defendant. It is conceded by the counsel for the plaintiff in error that, the land having

been conveyed to Nancy Randolph in 1870 by Fenton F. Randolph, she must be taken and held to own it and hold it, as her separate property, and it possessed that character when she and her husband attempted to convey it by the paper of February 25, 1880, but which was void as to her by reason of the fact that the certificate of acknowledgement is defective as to her because it omits the words required by the statute at the time that she acknowledged it to be her act. It is claimed also by her counsel that, her husband, Daniel F. Randolph, having no present interest in the land, but having a contingent estate for life in it dependent upon his surviving his wife, under Code, c. 66, s. 2, expressly providing "that no married woman, unless she be living separate and apart from her husband, or unless her husband be *non compos mentis*, shall sell or convey her real estate unless her husband consent thereto by joining in the deed or other writing by which the same is sold or conveyed," the deed, being invalid as to the wife, is of course, invalid as to the husband; and, if the wife had brought suit within ten years after the making of this paper, she clearly could have recovered possession in an action of ejectment, have resumed possession and control of the property, and, had she then died, her husband would, of course, have succeeded as tenant for life by the courtesy, and therefore the deed, being invalid as to her, was equally so as to her husband; and further contending "that if a married woman alone can make a paper purporting to be a deed without her husband uniting therein, or if she and her husband can make a paper purporting to be a deed, and the grantee in such paper can take possession, and his possession be adverse, the statute above quoted, which requires that the husband and wife shall unite in a deed to pass or convey her title to real estate could be practically nullified at the pleasure of the wife, because, where the real estate is her separate property, she alone can sue for its recovery, and she may easily evade the statute, which provides that she shall not alien her real estate without the consent of her husband by his joining in the conveyance, if, as is contended in this case, she herself can make a paper in the form of a deed, place the grantee or purchaser in possession, and let him remain on the property, claiming adversely to her. What remedy

would the husband have in such a case, if the statute of limitations is to be a bar? The right of the wife to dower cannot be barred by any act of the husband conveying his land, and we submit that the statute never intended that the wife might absolutely deprive her husband of his estate by the curtesy, by making a pretended sale and conveyance to a third party, placing the party in possession, and letting him occupy the position of an adverse claimant for the period of ten years. Where the land is the separate property of the wife in such a case, the husband cannot sue himself, nor can he use the name of his wife in a suit without her consent; and the result is, if this construction be given to the statute of limitations, that a married woman who is so disposed may absolutely deprive her husband of any contingent right in her real estate, and may, in the teeth and in despite of section 2 of chapter 66 of the Code, as effectually convey her real estate to a purchaser or third party as if her husband had united with her in a valid deed provided only that the purchaser or holder under the wife shall have such adverse possession for the period of ten years. We submit that what the wife cannot do directly she should not be allowed to do indirectly."

Plaintiff's contention is right so far as it claims that plaintiff could have maintained her action within ten years from the time of her conveyance, February 25, 1880, and placing her vendee in possession, and his argument following as to what a wife might do with her property might have some force in it in a case to which it would apply; but, the questions therein supposed not being involved in this case, I do not see that there is any call for giving the same consideration at this time. His position might be correct if this property had been conveyed to Nancy J. F. Randolph prior to the Code of 1868; but in the third section of chapter 104 of the Code, providing exemptions from the statute of limitations to persons under disability, married women holding lands as their sole and separate property are clearly relieved of such disability as to such separate property, and placed under the provisions of section 1 of said chapter, which says that "no person shall make an entry on, or bring an action to recover any land, but within ten years next after the time at which the right to

make such entry or to bring such action shall have first accrued to himself or to some person through whom he claims." The moment her vendee took possession under the deed of February 25, 1880, claiming thereunder adversely to her and every other person claiming the same as his own, placing it on the tax books in his own name, and fully enjoying the same to the exclusion of every other person, the statute began to run against her, she not being included as to said property among the persons mentioned in said section 3 as under disability, the Code of 1891 containing the same provision, and she being *sui juris* as to this property. The defendant, and those under whom he claimed, had held the possession of this property adversely to all the world for the period of almost thirteen years under the deed from plaintiff to P. C. F. Randolph of February 25, 1880, and, although the acknowledgment was defective as to the married woman, the plaintiff, and hence the deed void, yet it was sufficient as "color of title," showing the nature and extent of defendant's claim of the premises, and showing in him a claim in fee which tended to negative any right in any other person. It "also tended to show that his actual possession was adverse to all the world." *Swann v. Thayer*, 36 W. Va. 46 (14 S. E. 423); syllabus, pt. 1. Color of title, for the purpose of adverse possession under the statute of limitations as to land, is that which has the semblance or appearance of title, legal or equitable, but which is in fact no title. Any written instrument, however defective or imperfect, no matter from what cause invalid, purporting to pass or convey title to land, which defines the extent of the claim under it, is color of title. *Covey v. Porter*, 22 W. Va. 120, syllabus, pt. 8. In *Wright v. Mattison*, 18 How. 50, the court says: "Hence color of title, even under a void and worthless deed, has always been received as evidence that the person claims adversely to all the world." In *Welborn v. Anderson*, 37 Miss. 155, it was held that "a void deed will constitute color of title." In *Irey v. Markey*, 132 Ind. 546, (32 N. E. 309), the court says: "Assuming that the deed was void, possession having been taken under it, it was sufficient to give color of title as against the grantors, and to set in motion the statute of limitations." The coverture of the appellant does not affect the question,

as she has at all times since the execution of the deed been empowered by statute to sue in her own name and alone, in all cases where the action concerned her separate property. There is no error in the judgment, and the same is affirmed.

Affirmed.

CHARLESTON.

SNODGRASS v. KNIGHT *et al.*

Submitted February 1, 1897—Decided April 7, 1897.

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1. DEED—*Capacity of Grantor—Presumption of Law.*

The presumption of law is that the grantor in a deed was sane and competent at the time of its execution. (p. 295.)

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2. PLEADING.

Matters not set up in the pleadings can not be considered. (p. 295.)

Appeal from Circuit Court, Marion county.

Bill by Clinton B. Snodgrass against J. V. Knight and others. From a judgment dismissing the bill, plaintiff appeals.

Affirmed.

J. A. HAGGERTY and W. H. MARTIN, for Appellant.

JOHN W. MASON, for appellees.

BRANNON, JUDGE:

This is a bill in chancery, brought by Snodgrass against J. V. Knight and others, to annul a deed made by Albert T. Knight, by which he conveyed all of his real and personal estate to J. V. Knight and John W. Knight, resulting in the dismissal of the bill, and this appeal, taken by Snodgrass.

There is really nothing in this case calling for an opinion, or its publication in the Reports. It depends solely upon mere matter of fact, under evidence involving no legal principles but those that are elementary law and have been repeated hundreds of times. Like many other cases that are reported, it ought not to find a place in the Reports. The assault upon the deed is based alone in the bill on the grounds of insanity of the grantor and undue influence

practiced upon him by the grantees. There is utterly no evidence to show undue influence. As to the subject of mental incompetency, a volume of evidence was taken on both sides, and upon it the court has decided upon the validity of the deed. That finding is entirely justified by the presumption that the grantor was sane and competent at the time he executed the deed until the contrary be shown, and by the fact that the evidence decidedly goes to verify that presumption. *Buckey v. Buckey*, 38 W. Va. 168 (18 S. E. 383). I will not repeat the evidence here.

Counsel for the appellants introduce into this case by their brief the question of the delivery of this deed, saying that it never became operative because never delivered; but there is not a scintilla in the bill raising that question. No charge against the deed for non-delivery is made. On the contrary, the bill distinctly states as a fact that this deed was a complete and perfect deed, and as such assaulted it solely on the ground of mental incompetency and undue influence. We know that the grantor sent for one man to write that deed, and, not finding him, procured another, and that it was drawn, signed, acknowledged, is on record, and in the hands of the grantees; and no evidence at all in the case raises any ground to overcome the presumption raised by these circumstances that this deed was perfected by delivery. The possession of a deed, duly executed and acknowledged with all the formalities required by law, is *prima facie* evidence of its delivery.

Ward v. Ward, 43 W. Va. 1 (26 S. E. 542). I will not further discuss this matter, because the pleadings do not raise that question. Matters not in issue cannot be considered on the hearing. *Burley v. Weller*, 14 W. Va. 264.

Complaint is made that the court did not settle the administration accounts. That was not pertinent to this suit, which was solely to cancel that deed. It being held valid, all the personalty passed under it to the grantees therein. It does not appear that there was any personal estate anywhere acquired after that deed to go into the hands of an administrator. It was only a few days from its execution until his death. And if he had any other personal property, what would it have to do with this case? Decree affirmed.

Affirmed.

CHARLESTON.

BUXTON v. SHAFFER.

Submitted February 3, 1897—Decided April 10, 1897.

1. EXECUTORS—*Commissions—Wills.*

A will devises realty to four devisees equally, vesting them with legal title, and gives the executor naked power to sell for the interest of all concerned; and by agreement among the devisees they convey to each other in severalty certain parcels at agreed valuation, on account of their interests. The executor is not entitled to commission thereon. (p. 297.)

2. ELECTION TO TAKE LAND.

Election to take land referred to. (p.293)

Appeal from Circuit Court, Berkeley county.

Suit by Ella S. Buxton against D. W. Shaffer and others.

Decree for plaintiff, and defendant Shaffer appeals.

Affirmed.

FAULKNER & WALKER, for appellant.

FLICK & WESTENHAVER, for appellee.

BRANNON, JUDGE:

C. M. Shaffer, by his will, devised two parcels of realty to his daughters, Ella S. Buxton and Maria E. Shaffer, and then devised all his property, real and personal, one-third to his wife during life or widowhood, and the rest equally among four children, by the following language: "One-third of my estate I give unto my beloved wife, Ann M. Shaffer, during her natural life, as long as she remains my widow; the remaining part to my two boys, D. W. Shaffer and Charles H. Shaffer, and the girls to have shares proportionally, charging them with the parts set apart for them; all to share alike after my debts are paid. My wife has the privilege of taking any one of my houses as part of her thirds." And in the will is the clause: "I appoint my brother Joseph Shaffer and my son D. W. Shaffer my executors, with full power to sell any or all of my property which shall be to the interest of all concerned, or rent or

make use, as they think best for each other." These four children made a partition of the real estate, save a few parcels, and they joined in deeds, along with the executor, conveying to each one certain parcels thereof at certain valuations. This is a suit brought by Ella S. Buxton, one of the four children, against D. W. Shaffer, who qualified as sole executor, and the other children, for the purpose of settling the accounts of such executor as such. The case was referred to a commissioner, and before him the executor claimed, but was refused, a commission on twenty-seven thousand nine hundred dollars, being the valuation placed on the real estate which the said devisees, as above stated, conveyed to each other by the said agreed partition; and the court refused him this commission in its decree, from which he appeals.

The question, then, is, is he entitled to commission on this real estate which the devisees parceled out among themselves at a certain valuation? What estate vested in the executor in said real estate? Plainly, none, for the operation of the will was to confer upon the children the legal title to said realty, and the executor had a mere naked power to sell, not coupled with any interest or title in the realty. 1 Lomax, Ex'rs, p. 218, c. 1; *Dunn's Ex'rs v. Renick*, 33 W. Va. 476 (10 S. E. 810). I do not see how, when no estate whatever in that realty vested in the executor, when he was not chargeable with its rents, and had nothing to do with it save the mere power of selling, and that to be exercised only at the call, as I think, of the children, he could be entitled to any commission. Even where a will vests in an executor title with power to convert realty into personalty for distribution of the proceeds among devisees, they may elect to waive the conversion into personalty, and take the property as land, and dispense with a sale, in which case they take it as land. 2 Lomax, Ex'rs, 171. Where, in such case, the devisees unite in the conveyance of the property as land, it is an election to take it as land. An agreement among all the parties to hold the land in the proportion of the money bequeathed to them would be an election to take it as land. Where title is thus conveyed to an executor with power to sell, but there is no absolute injunction upon him to sell and it is unnecessary to sell,—as seems to be the

case here with respect to the property conveyed,—it is unnecessary to execute that power if those interested do not desire it, because there is no purpose to be answered by it. *Carney v. Kain*, 40 W. Va. 758 (23 S. E. 650). Indeed, where the whole beneficiary interests of the land directed to be converted into money by sale is in the children, a court of equity will not compel the executor to execute the trust against the wishes of the *cestuis que trustent*, but will permit them to take the land, if they elect to do so before the sale has been made, and this election they may make as well by acts or declarations clearly indicating it as by application to a court of equity. *Craig v. Leslie*, 3 Wheat. 563; *Harcum's Adm'r v. Hudnall*, 14 Grat. 369. But, in fact, this law about election only makes plainer the right of these children under this will to this property. In fact, we need not call it into requisition, because the will itself conferred the title and whole right on these children, giving no estate whatever to the executor. The power given him by this will was the merest naked power, intended to further the interests of the devisees as they should see their interests, or rather to further their mere will, for the language of the will indicates that the sale was only to be made if they desired it, and deemed such sale promotive of their interests. It was not to be made for the benefit of creditors, or for any reason outside the interests of the children. The executor received nothing from these lands. Why give him commission? His merely joining in the deeds by which the devisees conveyed to each other this realty does not make it what it essentially is not, a sale by him under the will. It was not necessary for him to join. He passed no title thereby. It was deemed prudent, perhaps, to make the title appear better on its face, but his participation therein was unsubstantial otherwise. A commission on actual receipts is, under the practice long established in Virginia and this State, the mode of compensation to personal representatives for their services, as laid down in *Kester v. Lyon*, 40 W. Va. 161 (20 S. E. 933); *Estill v. McClintic*, 11 W. Va. 399, and *Hoke v. Hoke*, 12 W. Va. 429. The cases of *Farneyhough v. Dickerson*, 2 Rob. (Va.) 582, and *Hipkins v. Barnard*, 4 Munf. 83, are referred to, to sustain this claim for commission. They held that where a personal repre-

sentative turned over to legatees bonds on their legacies or shares the executor would be entitled to commission. But in those cases they were personal assets, vested wholly in the representative, and when he turned them over they were received as money. But in *Claycomb's Legatees v. Claycomb's Ex'r*, 10 Grat. 589, it was held that where the executor turned over slaves to legatees or distributees he was not to be allowed commission on their value. The title to them was vested in him, but he was not to sell them unless required by the demands upon the estate. He was really there liable, chargeable with them, and yet was allowed no commission,—a much stronger claim for commission than here. And in the late case of *Metcalfe v. Colles*, cited to us as a New Jersey case found in 10 Atl. 804, it was decided that where it is not necessary to sell real estate to pay debts, and the executor surrenders it in kind to the devisees, he is not entitled to commissions on the price thereof. I have not had access to that case, but it surely is expressive of the law. There is no reason why this executor should charge his brother and sisters commissions on property with which he was not chargeable, and as to which he performed no duty. He simply signed those deeds. Surely, the line of decisions heretofore, directing us as to commissions, would not warrant its allowance by this Court.

The second point of objection against the decree is that the court decreed the sale of some other items of realty. There seems to be nothing in this point, because the unpaid debts of the estate beyond the personal assets, so far as appears, were upwards of one thousand and eight hundred dollars, and the real estate remaining undisposed of was valued at one thousand three hundred and fifty dollars, with a gross rental of one hundred and sixty dollars *per annum*, out of which taxes and repairs would have to be paid, and it would take many years for the realty by rental to discharge the debts of creditors who had right to payment in a reasonable time, and we see no error in the court in making provision for the sale of this part of the realty of the decedent. We therefore affirm the decree.

Affirmed.

CHARLESTON.

DAVIS *et al.* v. DAVIS *et al.*

Submitted February 4, 1897—Decided April 10, 1897.

WILLS—*Attesting Witness—Devise to Attesting Witness.*

If a will can be proved independently of the testimony of an attesting witness beneficially interested therein, a devise or bequest to such witness or her husband is not void. (p. 302.)

Appeal from Circuit Court, Wirt County.

Bill by J. A. Davis and others against George W. Davis and others. From a judgment dismissing the bill, plaintiffs appeal.

Affirmed.

WM. BEARD and V. B. ARCHER, for appellants.

F. B. LOCKHART and CASTO & FLEMING, for appellees.

DENT, JUDGE:

J. A. Davis *et al.* complain of a decree of the Circuit Court of Wirt county in the case of themselves against George W. Davis, *et al.*, sustaining a demurrer to and dismissing their bill as without equity. The bill was filed for the purpose of having two certain devises and legacies included in the last will and testament of Charles W. Davis, deceased, to Robert H. Davis and Delilah Davis, his wife, both of whom are deceased, declared null and void, and to have the personal property and real estate therein disposed of, distributed, and partitioned among the heirs of said testator. The grounds relied on to support the prayer for such relief is that Delilah Davis, now deceased, was one of the attesting witnesses to the will, and that, therefore, under section 18, chapter 77, of the Code, the bequests to herself and husband were void, while the will in all other respects is valid. The validity of the will or probate thereof is in no wise attacked by them, but because one of the devisees placed herself in the attitude of being an attesting witness to an undisputed instrument, which she is not called on to prove, both must be deprived of their interests thereunder. Is this the meaning of law? Two attesting witnesses, competent at the time of the attesta-

tion, are required, or the will is void for want of proper execution. If Mrs. Davis—there being only one other attesting witness—was incompetent at the time of the attestation, then the will is invalid; for section 18, chapter 77, Code, which is in these words: “If a will be attested by a person to whom, or to whose wife or husband, any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness; but such devise or bequest shall be void,” *etc.*,—does not render a person competent at the time of the attestation of the will, but only when called upon to prove the same. *Sullivan v. Sullivan*, 8 Am. Rep. 356. Appellants admit the attestation to be valid, but insist that it is only so for the reason that her disability to attest the will is taken away by destroying her interest therein; in other words, that she can be compelled to sustain the will for their benefit, although by so doing she destroy her legacy, and although the will might be otherwise proved; in other words, that it is the attestation that renders the legacy void, and not the fact that the will cannot be otherwise proved. For, according to their reasoning, even though the will can be otherwise proved, she being incompetent at the time of the attestation, the provisions made for herself and husband are void. In this manner they would nullify, not only the meaning, but the plain language, of the statute, as it was certainly intended that a valid will should not be held void, in any of its provisions, if established by disinterested testimony, and what the law deems sufficient. The only reasonable way to construe sections 3, 18, chapter 77, Code, is that the word “competent,” as used in each one of them, refers to the separate time to which they relate,—the first, to the attestation; the second, to the proof of the will. Mrs. Davis was competent as an attesting witness. While she was interested in the will the testator was alive, and, if the question of the attestation had arisen during his life, they were both competent to testify in relation thereto. Hence the word “competency,” in so far as it relates to an attesting witness, excludes the question of interest, and has reference to age, sanity, and moral integrity. As used in the eighteenth section in relation to the proof of the will, it has reference merely to the question of

beneficial interest; its object being to remove all motive for false swearing or forgery, and also the incompetency of the witness, occasioned by the death of the testator, thus throwing on the beneficiaries thereunder the burden of sustaining the will independently of their own testimony. If the will can be thus sustained, it is sustained as a whole, and not in parts, and none of its provisions are void, but all the beneficiaries take under it, even though the attesting witnesses were incompetent on account of interest.

In the case of *Blake v. Knight*, 3 Curtis 547, the chancellor said: "The result to which I come is that the court is not bound to have the positive affirmative evidence of the subscribing witnesses." In the case of *Jesse v. Parker*, 6 Grat. 57, Judge Allen says: "The law does not prescribe the mode of proof, nor that the will shall be proved as well as attested by a specific number of witnesses. If such proof were to be required from each subscribing witness, the validity of wills would be made to depend upon the memory and good faith of a witness, and not upon reasonable proof that all the requirements of the statute had in fact been complied with." And in the case of *Cheatham v. Hatcher*, 30 Grat. 56, Judge Staples says: "It is a wise rule which authorizes the material facts to be proved by one of the subscribing witnesses, or even by other competent testimony. If it were otherwise, the proof of a duly attested will might be defeated by the forgetfulness or perjury of some of them." In the case of *Webb v. Dye*, 18 W. Va. 376, it was held: "A will must be subscribed, but need not be proven, by two attesting witnesses." So the will under consideration could be otherwise proven than by the evidence of Mrs. Davis, whether she were living or dead, and there was no reason for her husband to commit uxoricide to prevent his bequest from being held void. If there was sufficient other legal means of establishing a will, she could not be compelled to be a witness against her own interest until these were exhausted. She at least would be afforded the opportunity of establishing the will by such other means or evidence. The proof of her signature has no weight in determining this question, as it was merely for the purpose of showing that two competent attesting witnesses were present, and

witnessed the execution of the will. The will is fully established by the other attesting witness. It might have occurred that the will could not have been established without the evidence of Mrs. Davis, and in such case, to make her competent as against the heirs of the testator, her beneficial interest would have to be avoided. Stating the converse of the proposition of the law, and it reads: "If a will attested by a person to whom, or to whose wife or husband, any beneficial interest in any estate is thereby devised or bequeathed, if the will may be otherwise proved, such person shall not be deemed a competent witness." If the word "competent," as here used, relates to the time of attestation, as claimed by the able counsel for the appellants, then a will attested by such person is void, although it may be otherwise proved. So the will, and not the special bequests, would be invalid because otherwise proved. This leads to absurdity. Following counsel's argument, the will, though invalid in its inception, could be rendered valid by destroying all other means of proof except that of the interested attesting witness. This, then, would exhibit great "inhumanity" on the part of the legislature, and "jeopardize the lives" of all non-interested witnesses, whether attesting the will or not. The legislature by such enactment did not intend "to confer any special favors," but its object was to preserve the common-law disabilities of interested witnesses, so far as not modified by statute; and therefore it rendered an interested person competent as an attesting witness, the testator being in life at the time, but incompetent as a proving witness, the testator being dead, if the will could be otherwise proved; and, if not, the competency of the witness, destroyed by the death of the testator, was restored by the destruction of interest, to prevent forgery and false swearing, as heretofore shown, and not to punish indiscretion on the part of an interested party. An interested attesting witness merely runs the risk of losing all beneficial right under the will by reason of the statutory provisions. Such risk he has the right to take, and is not subject to forfeiture merely by reason thereof. The circuit court did not err in its conclusion, and its decree is affirmed.

Affirmed.

CHARLESTON.

PACK v. SHANKLIN *et al.*(DENT, JUDGE, *dissenting.*)

Submitted January 27, 1897—Decided April 10, 1897.

1. WILLS—*Beneficiaries—Designation of Beneficiaries.*

S., by his last will and testament, directed that after his funeral expenses, *etc.*, were paid, the residue of his estate, both real and personal, be given equally between the three following benevolent causes, *viz.*: Home missions, foreign missions, and the American Bible Society; that is, to the trustee of each of the above causes. He meant the home and foreign missions of the Southern Presbyterian Church, except five hundred dollars which he directed to be loaned, and the interest on same to be applied annually to the support of pastor's salary, of the Southern Presbyterian Church at Centerville, Monroe county, W. Va. Upon a bill filed praying that said bequests be declared void, *held*, that said bequests are void, on account of the uncertainty of the beneficiaries. (p. 321.)

2. WILLS—*Trustees of Missions—Presbyterian Church.*

The "Trustees of Home Missions and Foreign Missions of the Southern Presbyterian church" cannot be considered to be a corporation identical with the one known as the "Trustees of the General Assembly of the Presbyterian Church in the United States," chartered by the legislature of North Carolina. (p. 320.)

3. WILLS—*Construction of Wills.*

In the interpretation of a will, the true inquiry is not what the testator meant to express, but what do the words used express. (p. 313.)

4. WILLS—*Certainty of Disposition—Validity of Disposition.*

To the validity of every disposition as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal. (p. 316.)

Appeal from Circuit Court, Monroe county.

Suit by J. W. Pack against John P. Shanklin, in his own right and as executor of the will of James Shanklin, deceased, and others. From the decree rendered, the trustees of the Generally Assembly of the Presbyterian Church in the United States appeal.

Affirmed.

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48 487

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43 304
61 271

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466 141
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JOHN W. HARRIS, for appellants.

A. F. MATHEWS, MILLER & REED and JOHN OSBORNE, for appellees.

ENGLISH, PRESIDENT :

This was a suit in equity, instituted in the Circuit Court of Monroe county, by J. W. Pack against John P. Shanklin, in his own right and as executor of the estate of James Shanklin, deceased, and others, seeking the interpretation of the last will and testament of James Shanklin, deceased, and praying that certain bequests, to wit: one made by said will to home and foreign missions of the Southern Presbyterian Church, or the trustees of said missions, and to the American Bible Society, or the trustees thereof, and to the support of the pastor's salary of the Southern Presbyterian Church at Centerville, W. Va., be declared void; that each and all of the charitable bequests be declared void; that the heirs and next of kin of said Shanklin, the testator, be declared entitled to all of his estate, after the payment of the debts. The plaintiff, in his bill, alleges that in the year 1893 James Shanklin departed this life, in the county of Monroe; that said Shanklin was never married, and left no children surviving him, nor did he leave any brothers or sisters surviving him, but left, as his heirs at law and next of kin, the plaintiff and the defendants, his nephews and nieces, except the home and foreign missions of the Southern Presbyterian Church and the American Bible Society; that the plaintiff is a nephew and one of the heirs at law and next of kin of said Shanklin; that said Shanklin died testate, having on the 23d day of July, 1892, executed his last will, which was on the 5th day of September duly probated and admitted to record; that said Shanklin, at the time of his death, was the owner of a large estate, real and personal; that said real estate is estimated to be worth from seven thousand dollars to eight thousand dollars. Said will directs that "after funeral expenses, *etc.*, are paid, that the residue of the estate, both real and personal, be given equally between the three following benevolent causes, viz.: Home missions, foreign missions, and the American Bible Society; that is, to the trustee of each of the above

causes. I mean the home and foreign missions of the Southern Presbyterian Church, except \$500, which I direct to be loaned, and the interest on same to be applied annually to the support of pastor's salary of the Southern Presbyterian Church at Centerville, Monroe county, W. Va.; and, in the event that the said church fails entirely to have a pastor, then the above sum to be equally divided between the above-named benevolent causes." And W. W. Pence and John P. Shanklin were by said will appointed executors, and duly qualified as such, and took charge of said estate, both real and personal. Plaintiff further alleges that, by said will, said James Shanklin attempts to dispose of his entire estate. He further alleges that the home and foreign missions of the Southern Presbyterian Church and the American Bible Society, or the trustees thereof, if there be any, are neither natural persons nor corporations, but they are, each and all of them, incorporated religious societies or organizations, whose members are perpetually changing, and the bequests and provisions of said will for their benefit are indefinite charitable bequests; that the beneficiaries under said will are each indefinite, uncertain, and unascertainable.

Plaintiff further charges that there are no trustees for said home and foreign missions and for said American Bible Society, or, if so, they are unknown to him; that the bequests of five hundred dollars to the support of the pastor's salary of the Southern Presbyterian Church at Centerville, Monroe county, is void, and the beneficiary is indefinite, unascertained, and unascertainable. The plaintiff further alleges that the Southern Presbyterian Church is not a natural person or a corporation, but a religious society, and the said home missions and foreign missions and American Bible Society are only agencies of said church or society; that, if there ever were trustees for said beneficiaries, they could not hold property and carry on business or sue in this State. And plaintiff further alleges that each and all of the bequests of said will are void, and that the whole of the estate real and personal of said James Shanklin should be, after the payment of the debts, distributed between his heirs at law and next of kin, who are entitled to the same; and he prays that the bequests made by said will to home and foreign missions of the Southern

Presbyterian Church, or the trustees of said missions, or to the American Bible Society, or the trustees thereof, and to the support of the pastor's salary of the Southern Presbyterian Church at Centerville, W. Va., be declared void, and that each and all of the charitable bequests be declared void; that the heirs and next of kin of the said Shanklin, the testator, be declared entitled to all of his estate after the payment of the debts.

The American Bible Society filed its separate answer, claiming that it was an incorporated body, duly incorporated by the general assembly of the state of New York, by an act passed March 25, 1845 (chapter 68), which has been enlarged and modified by subsequent acts, so that it is fully authorized and empowered to receive and appropriate any bequests or devises that might be made for its use as a corporate body, exhibiting with said answer authenticated copies of said acts, claiming that, under the same, it is fully authorized to receive and appropriate the bequests of the testator, James S. Shanklin. Said respondent further says that whatever construction the court may put upon the bequest of five hundred dollars to be put out at interest, and the interest to be applied annually to the pastor's salary of the Southern Presbyterian Church, respondent readily acquiesces; but, should the court hold that said provision cannot be enforced by the court, then respondent will claim that one-third part of said sum must be decreed to it, and the said bequest must be divided equally between or among the three benevolent causes named in said will.

On petition, the trustees of the general assembly of the Presbyterian Church in the United States were made party to this cause, and filed their answer thereto, putting in issue certain allegations of the plaintiff's bill, and admitting that the Southern Presbyterian Church is not a natural person, nor a corporation, but claiming that the same is a religious society, and that the said home and foreign missions are agencies of the said church or society. Said defendant further averred that the said Southern Presbyterian Church and the home and foreign missions of said church are capable, in law, of taking the bequests bequeathed in said will through this defendant, under and by virtue of a charter granted to this defendant by the

legislature of the state of North Carolina; and respondent says that it is not true that each and all of the bequests of said will are void, nor that the whole of the estate, real and personal, of said James Shanklin should, after the payment of his debts, be distributed to his heirs at law and next of kin. Said respondent further proceeds to set forth the provisions of the charter granted to them by virtue of the act of the legislature of the state of North Carolina ratified the 19th of February, 1866, claiming that thereby they are authorized and empowered to take and hold all such estate, property, and effects as may be acquired by gift, purchase, devise, or bequest to enable the General Assembly of the Presbyterian Church in the United States to undertake and carry on the work of Christian education, of foreign and domestic missions, of the publishing of such books, tracts, and papers as are connected with the diffusion of religious literature and learning, and of the building up and supporting churches of that faith and worship in the United States aforesaid; that all the estate, property, and effects that should be acquired by the said trustees and their successors at any time should be held and disposed of according to the directions of the general assembly aforesaid, provided that the property, real and personal, held or possessed by said corporation, should not exceed two millions of dollars; and, by the fourth section of the charter so granted to the defendant, it was further provided that, if the general assembly should establish any committees, boards, or agencies for any of the purposes recited in the first section of the charter, the same should be held and deemed branches of that incorporation; and, if any gift, grant, sale, devise, or bequest should be made to the trustees of the General Assembly of the Presbyterian Church in the United States for the use of such boards, committees, or agencies, the same should be good and effectual to pass to such objects, whenever the donor, grantor, bargainor, or testator should name the aforesaid corporation in general terms. And the defendant further alleges that the property, real and personal, held or possessed by it, does not exceed two millions of dollars. The defendants, further answering, proceed to state the existence of a body of Christians known as the "Presbyterian Church in the United States of

America," previous to the late Civil War, which embraced in its membership citizens of each of the United States, and states briefly their system of church government; that, in furtherance of the work of the church, the general assembly, at an early day, committed part of its work to certain members selected from time to time for the purpose, and constituted into boards, among which was the board of foreign missions, having in charge the work of missions in foreign lands, and also a board of home or domestic missions, which had charge of the work of missions in the United States; that on the 4th day of December, 1861, the Presbyterians within the bounds of the southern states composing the Confederacy, together with certain other Presbyterians, determined to separate from the Presbyterian Church of the United States of America, and sent commissioners to an assembly which met at that date in Augusta, Ga., and organized under the name of the "General Assembly of the Presbyterian Church in the Confederate States of America"; at the end of the war, this body, at its session in Macon, Ga., commencing the 14th December, 1865, changed the name of the church it represented to the "Presbyterian Church in the United States"; and said church since its separation, in 1861, has been popularly known as the "Presbyterian Church South," or the "Southern Presbyterian Church," and the Presbyterian Church in the United States of America, from which it separated, has been known as the "Presbyterian Church North," or the "Northern Presbyterian Church"; that the General Assembly of the Confederate States determined, among other things, upon the organization of permanent agencies for the purpose of conducting its foreign and home or domestic missions work, and, in pursuance of such design, established a committee of foreign missions, and a like committee of home or domestic missions; that the duty of the committee of foreign missions was to propagate the gospel ministry among the heathen, and this work was carried on by the general assembly through this committee, which was directly responsible to the general assembly; that the duty of the home or domestic missions committee was to propagate the gospel ministry in the destitute field within the territory of the church which was done by the general assembly,

through this committee; that upon the changing of the name of the church, in 1865, there was a corresponding change in the names of these committees, but they were commonly known as the home or domestic missions and the foreign missions of the Southern Presbyterian Church; and the defendant charges that the committees aforesaid were intended to be, and were, objects of testator's bounty. Respondent further alleges that said home and foreign missions of the Southern Presbyterian Church are duly created and constituted by the General Assembly of the Presbyterian church in the United States, commonly known as the "Southern Presbyterian Church," for the purposes hereinbefore set forth, and, as such, are agencies of the said church, and were such agencies so constituted at the date of the death of said testator; and being such agencies, under and by virtue of the act of the legislature of the State of North Carolina, they were incorporated, became a part and parcel of this defendant corporation, and, as such, this defendant, in law and in equity, is authorized to seize and take and hold the bequests given to the said home and foreign missions of the Southern Presbyterian Church under the will of the said testator; and the defendant prays that the said legacies or bequests so given to the said home and foreign missions of the Southern Presbyterian Church may be paid over to it.

The executors of said will also filed their answer, putting in issue the allegations of the plaintiff's bill, and a decree was entered in this case, referring the same to a commissioner, with instructions to audit, settle, and report the accounts of said executors. Certain facts were agreed among the parties to the suit: That a certain exhibit filed with the papers, marked "A," contained in fact true copies of the charter, by-laws, and resolutions of the defendant corporation, the trustees of the General Assembly of the Presbyterian Church of the United States, and of certain resolutions and directions of the general assembly of said church, commonly known as the "Southern Presbyterian Church," and that said corporation was, anterior to the death of the alleged testator, duly organized under said charter and the laws of the state of North Carolina, and that corporation is still existing and doing business as such, and that the property, real and personal,

held or possessed by said corporation, does not exceed two millions of dollars; that, at the time the will in question took effect, the said general assembly had a committee for the purpose of carrying on the work of home missions, known as the "Committee of Sustentation," and a committee for the purpose of carrying on the work of foreign missions, known as the "Committee of Foreign Missions."

An amended bill was filed by complainant, making the heirs at law of the testator parties defendant, setting forth the bequest contained in the will, and alleging that they were all invalid, because contrary to the laws and policy of the State of West Virginia, and because of the uncertainty of the legatees, and the vagueness and indefiniteness of the beneficiaries of said bequests; that if the claim of the trustees of the General Assembly of the Presbyterian Church that they were duly incorporated under the act of the assembly of North Carolina be correct, and if said act also incorporates its board of home and foreign missions, yet said act of incorporation under which they claim to have organized is contrary to the settled law and policy of this State; that said act of assembly clearly attempts to incorporate a church, and to incorporate all the agencies of that church, which is not only repugnant to the organic law of this State, but of the State of North Carolina; that the trustees of the boards of home missions and foreign missions are appointed by the general assembly, and not by the trustees; that said boards have never organized or attempted to organize as separate and independent corporations, and have never been in any way under the control of the trustees of the general assembly; that the bequest to the Bible Society is void for want of certainty in the beneficiaries; and that the investment of the five hundred dollars is void, because no one is appointed by the will to take and hold the legal title, and the beneficiary is a nameless and uncertain person. The American Bible Society, the executors, and said trustees filed their answers to said amended bill, adopting their answers to the original bill, to which the plaintiff replied generally. Said commissioner's report was returned and excepted to.

On the 8th day of October, 1895, a decree was entered in the cause, overruling the exceptions to said commissioner's report, and confirming the same, and holding that

so much of the will of James S. Shanklin, deceased, as directed that his estate, except five hundred dollars, be "equally divided between the three following benevolent causes, viz: Home missions, foreign missions, and the American Bible Society; that is, to the trustee of each of the above causes. I mean the home and foreign missions of the Southern Presbyterian Church,"—was void, except as to the American Bible Society, as contrary to the Constitution and hostile to the policy of the State of West Virginia; that so much of said will as directs that five hundred dollars be loaned out, and the interest on the same applied to the support of pastor's salary of the Southern Presbyterian Church at Centerville, Monroe County, W. Va., was void for uncertainty; that the said American Bible Society was entitled to one-third of said estate, and that the other two-thirds should pass to the heirs at law and distributees of said James S. Shanklin. Said account was recommitted to said commissioner, with instructions to make further settlement of the accounts of the executors; and it was further decreed that W. W. Pence recover against the estate of the said James S. Shanklin the sum of nine hundred and fifty-eight dollars and eighty-five cents, with interest from the 19th of March, 1895, and that John P. Shanklin recover against said estate the sum of eight hundred and nine dollars and sixty cents, with interest thereon from the date last aforesaid, and that the sum of one hundred dollars be paid to Logan & Patton for their services as counsel in this suit on behalf of said executors, to be paid by said executors out of the funds in their hands, and from this decree the trustees of the General Assembly of the Presbyterian Church in the United States obtained this appeal.

The appellant, in its petition for this appeal, represents that it is the party designated to take under said will by the general description of the trustees of the home and foreign missions of the Southern Presbyterian Church; that there is no uncertainty as to this fact; that, the appellant being an incorporated body, the rule as to charitable bequests does not apply; and that it is entitled to take and hold under said will, and claims that the circuit court of Monroe county, by its decree of October 8, 1895, committed an error in setting aside the will of said Shanklin, ex-

cept as to the gift to the American Bible Society, and in holding the provisions therein in behalf of appellant to be void, as contrary to the Constitution and hostile to the policy of the state of West Virginia; and that it was also error in said decree to allow John P. Shanklin, one of the executors, eight hundred and nine dollars and sixty cents, and W. W. Pence, the other executor, the sum of nine hundred and fifty-eight dollars and eighty-five cents, for alleged services, in support of which no sufficient competent evidence was offered. Now, in considering the questions raised in this assignment of error, we notice, first, the cardinal rule controlling the interpretation of wills, that the intention of the testator must be looked for, and, in order to ascertain the meaning of the testator, we must take the will by the four corners, and look upon its face, and there find the intent from the words used. As was announced in the case of *Couch v. Eastham*, 29 W. Va. 784 (3 S. E. 23): "In the interpretation of a will, the true inquiry is not what the testator meant to express, but what do the words used express." The appellant, in its assignment of errors, represents that the "Trustees of the General Assembly of the Presbyterian Church in the United States" was the party designated to take under said will by the general description of the "Trustees of the Home and Foreign Missions of the Southern Presbyterian Church," and there is no uncertainty as to this fact, and that, the appellant being an incorporated body, the rule as to charitable bequests does not apply, and that appellant is entitled to take and hold under said will, in accordance with its terms. When, however, we look to the face of the will, it is found that the bequest is made to the following benevolent causes, viz.: "Home missions, foreign missions, and the American Bible Society; that is, to the trustee of each of the above causes." And, by way of explanation, testator says: "I mean the home and foreign missions of the Southern Presbyterian Church." It is difficult, however, to understand how the trustees of the General Assembly of the Presbyterian Church in the United States could have been intended by the language used in the will, and the language is not explained by parol testimony.

If it were thought necessary in this case to review the

early decisions founded upon cases arising in Virginia, and call attention to the jealous scrutiny with which the courts guarded against any attempt to concentrate money in the hands of religious associations, we might well content ourselves by calling attention to the case of *Association v. Hart's Ex'rs*, decided by the supreme court of the United States, and reported in 4 Wheat. 1, which was ably argued by William Wirt, the attorney general, on one side, and Benjamin Watkins Leigh, on the other, and an able and elaborate opinion rendered by Chief Justice Marshall. The case originated in Virginia, and the question was whether, under the following clause, contained in the will of Silas Hart: "Item. What shall remain of my military certificates at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that, for ordinary, meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family,"—said Baptist Association could take the bequest above mentioned. This bequest was made subsequent to the repeal of the English statute of 43 Eliz. c. 4, in reference to the charitable uses. The chief justice, in his able opinion, reviews the common-law and English statutes upon the subject, and concludes that the association, in not being incorporated at the testator's decease, could not take this trust as a society, that the bequest could not be taken by the individuals who composed the association at the death of the testator, and that there were no persons to whom this legacy, were it not a charity, could be decreed, and that it could not be sustained in that court as a charity, and by also referring to the case of *Gallego's Ex'rs v. Attorney General*, 3 Leigh. 450, in which a very able and exhaustive opinion was handed down by Tucker, P.

One of the questions presented in that case was as to whether certain bequests made by said Gallego as charities to the Catholic Church were valid or void, and they were held void, the first point of the syllabus reading as follows: "Testator directs his executors to lay by \$2,000 to be distributed among needy poor and respectable widows, and, in case the Roman Catholic Chapel shall be con-

tinued at time of his death, to pay \$1,000 towards its support, and, if the Roman Catholic congregation shall come to a determination to build a chapel at Richmond, to pay \$3,000 towards its accomplishment; and he devises a lot in Richmond to four trustees in fee, upon trust to permit all and every person belonging to the Roman Catholic church, as members thereof, or professing that religion, and residing in Richmond at the time of his death, to build a church on the lot, for the use of themselves and all others of that religion who may hereafter reside in Richmond. Upon information filed by the attorney general, in chancery, to enforce the charitable bequests and devise, held, that the bequests and devise are uncertain as to the beneficiaries, and therefore void." "The English statutes of charitable uses (43 Eliz.) having been repealed in Virginia, the courts of chancery have no jurisdiction to decree charities, where the objects are indefinite and uncertain." Judge Tucker, in the course of his opinion, says: "The history of the papal see, and of the religious houses under its dominion, is but a history of the cupidity of monks and devotees, veiled under the sacred garb of our holy religion. The vast domains of the clergy acquired by the Catholic establishment of France are known to us all. From this fatal source, among others, sprung a revolution which deluged the fairest country in Europe in blood, and, in its horrible progress, spread desolation over adjoining states, and shook the civilized world to its center. And in Protestant England, fenced around, as it has been, with *mortmain* acts, we see a church establishment possessed of overgrown wealth and power, less devoted to the cause of genuine religion than to pamper the luxury and indolence of the high dignitaries of the church. With these examples before our eyes, it is not wonderful that our statesmen have been cautious. They have been wise in their caution. The evil has not sprung from particular creeds or the peculiarities of a confession of faith. It grows out of the very nature of the thing. The church, if made capable to take, while it is continually acquiring, from the liberality of the pious, or the fears of the timid, or the credulity of the ignorant, never can part with anything; and thus, like those sustaining powers in mechanics which retain whatever they once have gained, it advances with a

step that never retrogrades. The natural cupidity of the human heart is watched by the devotee himself, with the less jealousy in his pursuit after acquisitions for the church, since he believes it to be purified from the dross of selfishness, and sanctified by the holy object of his ambition. Thus it is that, however humble in its beginning, accumulation is the natural result of the power vested in any religious society to acquire property."

In the Acts of 1841-42 of the legislature of Virginia (page 60, c. 102) it was provided that "every conveyance devise or dedication shall be valid which since the 1st day of January, 1777, has been made, and every conveyance shall be valid which hereafter shall be made of land for the use or benefit of any religious congregation as a place for public worship or as a burial place or a residence for a minister; and the land shall be held for such use or benefit, and for such purpose, and not otherwise." The court of appeals of Virginia, construing this statute in the case of *Seaburn's Ex'r v. Seaburn*, 15 Grat. 423, which was decided in 1859, held "that this section does not authorize a devise of land for the use of a religious congregation, but only a conveyance by deed;" also, that it "did not authorize a bequest of money to be expended in building a church at a specified place, or for the support of the pastor of such church." Upon the question of the certainty and the definiteness of bequests, we refer to the case of *Janey's Ex'r v. Latane*, 4 Leigh. 327, the syllabus in which case reads as follows: "Testator bequeaths to the school commissioners and their successors of South Farnham district, Essex Co., for the schooling of the poor children of that district, \$1,000, to be put out at interest, and the interst only to be applied for the schooling of said poor children. There are school commissioners in the county of Essex, and testator was one of them at his death, but they are not a corporate body. There are no school commissioners of South Farnham district, nor any such district, that being only the name of an ancient parish. Held, the bequest is void." Upon this question, Jarman on Wills (volume 1. p. 356) thus states the law: "To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal." In the cases of *Brooke*

v. *Shacklett* and *Carter v. Wolfe*, 13 Grat. 301, decided in 1856, the case of *Gallego's Ex'rs v. Attorney General*, 3 Leigh. 450, was approved.

In the constitution of Virginia of 1851 (article IV, section 32) it was provided that "the general assembly should not grant a charter of incorporation to any church or religious denomination, but might secure the title to church property to an extent to be limited by law"; and the same, in substance, is found in the Constitution of West Virginia (article VI, section 47). Other cases might be cited to show the disposition on the part of the courts and legislature of the State of Virginia to prevent the accumulation of money in the hands of religious institutions, and the encroachment of such institutions upon the affairs of state.

The first case considered by this Court bearing upon the question was that of *Carpenter v. Miller's Ex'rs*, 3 W. Va. 174, in which it was held: "A clause in a codicil to a will devising estate 'to the propagation of the gospel in foreign lands' is void for uncertainty in the devisee." The next case was that of *Society v. Pendleton*, 7 W. Va. 79, which involved the construction and interpretation of the will of one Maria Cooper, who died some time in 1855, testate, having in her will made the following bequests: "First. I subscribe \$2,000 to the founding of an academy in or near the town of Martinsburg, to be under the control and direction of the Presbytery of Winchester [old school], which, if not sooner paid by me, I hereby direct my executor first of all to pay out the proceeds of the aforesaid land [referring to land in Pennsylvania] as soon as the same may come into his hands, to such person or persons as the said Presbytery may authorize to receive the same, the sum of \$2,000. Second. I give to the trustees of the Presbyterian congregation at Martinsburg [old school] the sum of \$3,000, to be applied by them towards the purchase of a lot and the erection thereon of a house, or the purchase of a house and lot, and fitting the same for the residence of the pastor of said congregation. Third. To the trustees of the board of foreign missions of the Presbyterian Church in the United States of America the sum of \$500, to be applied to the uses and purposes of said board, and under its direction. Fourth. To the trustees of the board of missions of

the General Assembly of the Presbyterian Church in the United States of America, towards the fund for superannuated ministers and their families, the sum of \$5,000. Fifth. To the trustees of the board of missions of the General Assembly of the Presbyterian Church in the United States the sum of \$500. Sixth. To the American Bible Society, formed in New York in the year 1816, I give the sum of \$500, to be applied to the charitable uses and purposes of said society." It was there held that said bequests were void under the statutes of Virginia and the decisions of her courts.

The next case in this Court bearing upon the question is the case of *Wilson v. Perry*, 29 W. Va. 169 (1 S. E. 302), in which the will of John W. Perry, a citizen of Monroe County, W. Va., was construed, and the validity of certain bequests therein contained was passed upon, the Court holding the following charitable bequests contained in said will, viz: five hundred dollars to inclose the Mt. Pleasant church and graveyard; four thousand dollars to purchase a parsonage for Mt. Pleasant church; two hundred and fifty dollars for the Presbyterian Sunday school at Union; two hundred and fifty dollars for the Sunday school at Centerville; two hundred and fifty dollars for the Sunday school at Fairview school house; three hundred dollars for the home missions of the Presbyterian Church; and the remaining half of the residue of said estate to purchase a parsonage at Union,—to be uncertain as to the beneficiaries, and therefore void. In that case this Court considered and approved the case above mentioned, of *Association v. Hart's Ex'rs*, 4 Wheat. 1, and *Gallego's Ex'r v. Attorney General*, 3 Leigh. 450.

And again, in the case of *University v. Tucker*, 31 W. Va. 621 (8 S. E. 410), this Court held that foreign corporations may take bequests of charities under a will made in this State when and to the extent authorized by their charter; also, that, when such corporations are improperly described in the will, the bequest will not fail if it be clearly shown by proper proof what corporations were meant by the description. This case is relied on by the appellant in this cause, it being contended that the bequests to home and foreign missions of the Southern Presbyterian Church were bequests to a foreign corporation.

Now, let us examine the bequests contained in the will under consideration. Can we say that a portion of James S. Shanklin's property, real or personal, was thereby given or intended to be bestowed by any clause in his will upon any corporation, either foreign or domestic? He directs his estate, both real and personal, to be given equally between the three following benevolent causes, viz: "Home missions, foreign missions, and the American Bible Society; that is, to the trustees of each of the above causes. I mean the home and foreign missions of the Southern Presbyterian Church." There is no proof in the cause that any corporation was intended by the language used in this will. It is true, there is an agreed statement of facts in the case, first, that a paper thereto annexed, marked "A," contains printed copies of the charter and by-laws of the trustees of the General Assembly of the Presbyterian Church in the United States, and of certain resolutions and directions of the general assembly of said church, and that they are true copies of said charter, by-laws, and resolutions, and that said corporation was duly organized under said charter and the laws of North Carolina before the death of testator, and is still existing and doing business as such, and its property, real and personal, does not exceed two millions of dollars; that, at the time the will in question took effect, the said general assembly had a committee for the purpose of carrying on the work of home missions, known as the "Committee of Sustentation," and a committee for the purpose of carrying on the work of foreign missions, known as the "Committee of Foreign Missions"; that testator was for a number of years a member and officer of said church, was greatly devoted to said church, and took an active part in its work, and declared his intention of making provision in behalf of foreign and home missions in his will. Did James Shanklin, by his will, give any of his property to any corporation, foreign or domestic? The language therein contained gives it to home missions, foreign missions, and the American Bible Society; that is, to the trustee of each of the above causes. What trustee? Even if we were to hold that the words were added by way of explanation, "I mean the home and foreign missions of the Southern Presbyterian Church," yet that explanation fails to point out any corporation that is to take.

It appears in the agreed statement of facts that the trustees of the General Assembly of the Presbyterian Church of the United States, commonly known as the "Southern Presbyterian Church," had a committee of sustentation for the purpose of carrying on home missions, and a committee for the purpose of foreign missions, known as the "Committee of Foreign Missions"; but neither of these was a corporation, nor could they be under the Constitution and laws of West Virginia. When we refer to the charter of this North Carolina corporation, it is found that the trustees of the General Assembly of the Presbyterian Church in the United States are authorized to take and hold all such estate, property, and effects as might be acquired by gift, purchase, devise, or bequest to aid and enable said General Assembly of the Presbyterian Church to undertake and carry on the work of Christian education, foreign and domestic missions, *etc.*; so that it is easily perceived that, under the charter of this North Carolina corporation, there is no trustee of home missions or foreign missions. The agreement of facts shows that there was a committee of sustentation, and a committee for carrying on the work of foreign missions, under the direction of the General Assembly. It does not appear that the General Assembly was a corporation, but this corporation was authorized to receive contributions, bequests, *etc.*, to aid the General Assembly of the Presbyterian Church in carrying on foreign and domestic missions. These committees were the agents and instruments of said General Assembly, and we cannot say who was intended by the trustee of each of these causes, home and foreign missions of the Presbyterian Church. The bequest is too indefinite, and we cannot say to whom the executor would be safe in paying this legacy: and we may well ask, who is entitled to demand and receive this legacy,—the committee appointed by the General Assembly or the corporation known as the "Trustees of the General Assembly of the Presbyterian Church in the United States"? The words of the will give the bequests to neither, and we must hold it void for uncertainty: and although the pleadings in this cause are not such as would authorize a decree directing a settlement of the accounts of the executors, and a convention of the creditors of said testator, yet the parties to the cause being

of opinion that it would facilitate the settlement of the estate, of said testator, and save costs to said estate, to have the creditors convened, and accounts of said executors settled, and directions given to them as to the collection and distribution of the assets of the estate, as if the pleadings in the cause had been properly framed to that end, and having consented to such convention and settlement, and these matters having been referred to a commissioner, who reported thereon, which report was excepted to by the American Bible Society and the trustees of the General Assembly of the Presbyterian Church in the United States, and the court having, as we think, properly overruled the exceptions taken to the report of Commissioner Kester, and confirmed the same, and decreed in favor of W. W. Pence the sum of nine hundred and fifty-eight dollars and eighty-five cents, with interest thereon from the 19th day of March, 1895, until paid; and in favor of John P. Shanklin, against said estate, the sum of eight hundred and nine dollars and sixty cents, with interest thereon from the date last aforesaid until paid, and that the sum of one hundred dollars be allowed Logan & Patton, as counsel in said suit, for their services as counsel of said executors, to be paid by said executors out of funds in their hands, the decree is in this respect affirmed. The decree is also affirmed so far as it holds that so much of the will of James S. Shanklin, deceased, as directs that his estate, except five hundred dollars, be divided equally between the three following benevolent causes, viz.: "Home missions, foreign missions, and the American Bible Society; that is, to the trustees of each of the above causes. I mean the home and foreign missions of the Southern Presbyterian Church,"—is void, as contrary to the Constitution and hostile to the policy of the State of West Virginia, except as to the bequest to the American Bible Society, which is shown to be a corporation, and entitled to take under the will. I also affirm the decree complained of so far as it holds that so much of said will as directs that five hundred dollars be loaned out, and the interest on the same applied to the support of pastor's salary of the Southern Presbyterian Church at Centerville, Monroe county, W. Va., is void for uncertainty, and the appellees must recover their costs and damages.

DENT, JUDGE (*dissenting*) :

I cannot concur in the foregoing decision, because I cannot stultify myself into the pretense of believing that to be false which I believe from the record to be true, to wit, that the trustees of the General Assembly of the Presbyterian Church of the United States is a legally incorporated body under the laws of the state of North Carolina, duly authorized as such trustees to receive and hold, on behalf of the "Southern Presbyterian Church," bequests of money for "home and foreign missions," and that the testator, James S. Shanklin, in his last will and testament, intended to designate such board in his bequests to the trustees of home and foreign missions of the Southern Presbyterian Church. Such trustees are before the court, asking that such will be executed according to its true tenor and effect, and yet the court, in disregard thereof, says: "When we refer to the charter of the North Carolina corporation, it is found 'the trustees of the General Assembly of the Presbyterian Church in the United States are authorized to take and hold all such estate and effects as might be acquired by gift, purchase, devise, or bequest, to aid and enable said General Assembly of the Presbyterian Church to undertake and carry on the work of Christian education, foreign and domestic missions,' *etc.* So that it is easily perceived that, under the charter of this North Carolina corporation, there is no trustee of home missions or foreign missions." The corporation itself is the legal trustee of all funds for home and foreign missions. What further trustee is needed? It is an absurdity to say that a legally constituted board of trustees of home and foreign missions must have other trustees specially for such funds before they can take under a bequest to the trustees of such funds.

There cannot be the possibility of a doubt that the testator, not being aware of the proper designated church repository to receive such bequests, by naming the trustees of each of such funds, intended thereby the bequests to go to such body as was legally authorized to receive the same, being the appellants; thus bringing his will in accord with the language used in the case of *Wilson v. Perry*, 29 W. Va. 197 (1 S. E. 323), to wit: "The general rule on this subject is that where the name or description of

the legatee is erroneous, and there is no reasonable doubt as to the person intended to be named or described, the mistake will not defeat the bequest, and this rule applies as well to a corporation as to a natural person." In the case of *Ross' Ex'r v. Kiger*, 42 W. Va. 402 (26 S. E. 193), this Court held: "Where a bequest of money is made to a missionary society by a testatrix, designating the society by a mistaken name in her will, it may be shown by extrinsic testimony and surrounding circumstances what missionary society was intended." The reasoning in the case referred to is well adapted to the admitted existing circumstances and surroundings of the present case, but the conclusion reached is directly the reverse. The testator bequeathed his money to home and foreign missions, and designated the Southern Presbyterian Church, being the body to which he belonged, to be the vehicle of his bounty, and the trustees legally authorized by and for such church to take and hold such funds for the uses aforesaid, and these trustees are completely and fully established by the record to be the appellants. Nor is there anything in the laws or policy of the State of West Virginia that even militates against the donation of money to be expended for the religious and moral education of any people. If there is, the sooner such policy is changed the better it will be for the good name, fame, and integrity of the State.

Affirmed.

CHARLESTON.

BAER SONS GROCER Co. *et al.* v. WILLIAMS *et al.*

Submitted January 19, 1897—Decided April 17, 1897.

1. DEED OF TRUST—*Merchandise—Extension of Trust—Fraud.*

A trust deed on a stock of goods for the security of creditors which provides that the trustees shall take immediate possession of such goods, and manage them for the benefit of the trust, is not fraudulent *per se*, and void as to creditors, because it contains a provision allowing the grantor, without the power of sale, to replenish such stock of goods, and extending the trust to cover the same. (p. 326.)

48	393
45	470
45	472
43	322
56	387
43	323
166	443

2. DEED OF TRUST—*Fraud—Knowledge of Parties.*

Where neither the *cestui que* trust nor trustee has notice of the fraud in fact, which would otherwise render the trust deed invalid, it will not be held fraudulent as to them. (p. 328.)

3. DEED OF TRUST—*Merchandise—Preferred Creditors.*

Under section 2 of chapter 74 of the Code, a deed of trust which conveys a stock of goods to a trustee, to secure a creditor to the exclusion of other creditors of an insolvent grantor is void as to the preference thereby secured, although given for the present loan of money, there being no exception in the statute as to such creditors. (p. 329.)

4. DEED OF TRUST—*Insolvent Debtor—Liability of Trustee—Equity Practice.*

When a trustee under a deed of trust executed by an insolvent debtor, without notice to the vendor, takes possession of goods ordered on credit before the execution of the trust, but not shipped or received until afterwards, and sells them, and appropriates the proceeds to the use and benefit of the trust, a court of equity, at the instance of the vendor, will charge the value of such goods as a prior lien on the trust funds in the hands of such trustee. (p. 331.)

Appeal from Circuit Court, Mason county.

Suit by Baer Sons Grocer Company and others against N. B. Williams, John E. Beller, and others. Decree for defendants. and plaintiffs appeal.

Reversed.

TOMLINSON & WILEY, for appellants.

JOHN E. BELLER and GEO. POFFENBARGER, for appellees.

DENT, JUDGE:

Baer Sons Grocer Company and others, creditors of N. B. Williams, filed their bill in the Circuit Court of Mason County against John E. Beller, trustee, and others, attacking the following deed of trust as fraudulent *per se*, fraudulent in fact, and void as a preference, under section 2, chapter 74, Code: "Deed of Trust. This deed, made the 21st day of November, 1894, between N. B. Williams, of the first part, and John E. Beller, trustee, of the second part, all of Mason county, West Virginia, witnesseth: That for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, the said party of the first part does hereby grant unto the said John E.

Beller, trustee, all of the following named and described personal property, now being situate in the brick building now occupied by the said N. B. Williams as a grocery, on the west side of Main street, between Fourth and Fifth streets, in the town of Point Pleasant, Mason county, West Virginia, viz: 3 show cases, 1 cheese case, 1 extract case, 1 stepladder, 1 broom rack, 1 pair Fairbanks' scales, 14 barrel covers, office outfit, 5 lamps, 1 oil tank, 1 meat saw, 2 meat knives, 1 meat rack, 1 turine holder, 1 beef clipper, 1 fruit case, 2 pair scales, 2 cracker cases, 4 tea cans, 3 small tea cans, 1 refrigerator, 2 curtains, 1 barrel truck, 1 outside fruit case, one delivery wagon, 1 black horse; also all the goods, wares, merchandise, groceries, queensware, and other goods now being in said building above mentioned, where said N. B. Williams is now doing business in said town of Point Pleasant,—in trust to secure A. F. Kisar, or order, the payment of two certain promissory notes, each bearing even date with this deed, each for the sum of five hundred dollars, with eight per cent interest from date, each payable to A. F. Kisar or order, each being executed by the said N. B. Williams, one of said notes due and payable in thirty days from date, the other of said notes due and payable in sixty days from date. And it is agreed that in case default be made in the payment of said notes or either of them, together with the interest thereon, when they respectively become due and payable, that then said trustee shall, at the request of the owner of said notes, or either of them, sell for cash the property hereby conveyed, after first advertising the time, terms, and place of sale in the manner prescribed by law. And it is further agreed that said party of the first part shall keep in stock, at all times, goods, wares, merchandise, groceries, queensware, and other goods in said places of business to an amount equal to the stock of goods now on hands in said building, and hereby conveyed; and the lien of this deed shall attach to all of such goods, wares, merchandise, groceries, queensware, and other goods which the said N. B. Williams shall from time to time put into said building and stock of goods, the same as if such goods were herein specifically set forth. And it is further agreed that such trustee shall take immediate possession of the property hereby conveyed, and hold and manage the same for the

purposes of this trust. And the said party of the first part warrants generally the property hereby conveyed. Witness the following signature and seal. N. B. Williams. [Seal.]" Defendants insist the bill is demurrable for multifariousness. A plaintiff has the right to join in the same bill different causes of action between the same persons, and affecting the same subject-matter. This is elementary law.

1. Is the deed fraudulent *per se*? Plaintiffs insist that the clause allowing the grantor to replenish the stock renders it so, although the trustee is to take immediate possession thereof, and manage the same for the benefit of the trust. There is nothing on the face of the deed to show that the grantor is indebted to any one else, or that she has not other means to purchase goods to replenish the stock; and it is not unreasonable to suppose that she desired to keep the stock fully replenished, so as to keep the business profitable, that the proceeds thereof would sooner pay off the trust lien. Between herself and the trust creditor, where the rights of others do not interfere, there is no good reason why the new goods purchased by her should not become subject to the trust lien without the continual renewal thereof. If, however, it was contemplated by the grantor and the trust creditor that she should buy goods on credit, and that the trust should extend to such goods, such trust would be fraudulent as to subsequent creditors. This does not appear from the deed, but depends on extraneous testimony; and, as far as the deed shows, it may have been entered into in perfect good faith, without the remotest intention to commit fraud. If the grantor had retained the right to sell as well as replenish, then the deed would have been fraudulent *per se*. The possession is given at once to the trustee, which precludes the implied right to sell, which would have otherwise resulted from the language used. Counsel insist that the possessory clause was inserted to evade the former decisions of this Court. Was it not inserted rather to comply therewith, and render the trust legal and valid? It is also insisted that the trustee had no power of sale for thirty days. This means in bulk. The power given him to manage the same for the benefit of the trust, it being a stock of merchandise, would authorize him to sell at retail, if

beneficial to the trust, until the time should arrive to sell in bulk. The right to sell at retail is a necessary implication from his authority to manage and control. In the case of *Landeman v. Wilson*, 29 W. Va. 707, (2 S. E. 205), it is said: "In all, or at least in most, of the cases in Virginia and in this State, where deeds of trust have been held fraudulent on their face, it appeared that the property conveyed, or a part thereof, was of a perishable nature, and the deed contained a clause permitting the debtor to retain possession and control." *Lang v. Lee*, 3 Rand. (Va.) 411; *Sheppards v. Turpin*, 3 Grat. 373; *Spence v. Bagwell*, 6 Grat. 444; *Addington v. Etheridge*, 12 Grat. 436; *Kuhn v. Mack*, 4 W. Va. 186; *Gardner v. Johnston*, 9 W. Va. 403. In the following cases the right to possession and sale was implied from the terms of the instrument: *Claffin v. Foley*, 22 W. Va. 434; *Livesay v. Beard*, Id. 585; *Klee v. Reitzenberger*, 23 W. Va. 749; *Shattuck v. Knight*, 25 W. Va. 580. Where the property is not consumable, or of such character that the right of sale thereof is necessarily implied, the retention of possession is not inconsistent with a deed of trust thereon. *Klee v. Reitzenberger*, 23 W. Va. 749. There is not sufficient on the face of the present deed to indicate fraud. The grantor neither retains possession, nor the right of sale, but immediately turns the property over to the trustee to be managed for the benefit of the trust. There was nothing to hinder creditors from at once obtaining a lien on the equity of redemption, and having the same enforced by a court of equity. *Doheny v. Dynamite Co.*, 41 W. Va. 1, (23 S. E. 525); *Harris v. Alcolls*, 32 Am. Dec. 158.

2. Is the deed fraudulent in fact? O. F. Williams, who was doing business in the name of his sister, N. W. Williams, and who engineered this whole transaction in her name, and almost entirely without her knowledge, did so undoubtedly with fraudulent intent towards the creditors. Instead of endeavoring to pay them, he was trying to get their property beyond their reach. Pressed by the creditors, he borrows one thousand dollars on the stock, part of which he pays on the debts, but the larger part of which he at least pretends not to know what he did with, except that he used it. In the whole transaction his fraudulent

intent is painfully apparent, and, if it had been shown that the creditor Kisar had notice thereof, the deed must be held to be fraudulent and void as to the plaintiffs. He was placed on the witness stand by the plaintiffs, and testified that he had been informed by A. F. Williams that one thousand dollars would free the store from debt, and enable him to replenish the stock, and, upon this showing, he furnished him six hundred dollars, and had a note discounted at the bank for four hundred dollars, in which was included a fifty dollar note, and it might be a one hundred dollar note, pre-existing indebtedness; that the transaction was in good faith, for the purpose of enabling a continuance of the business; that a bill of sale for the goods, in consideration of the trust debt, had been tendered him, which he refused, on advice, to accept. If his evidence is to be believed,—and it seems to be vouched for by plaintiffs,—he was acting in good faith, without notice of fraudulent intent. *Merchandise Co. v. Laird*, 37 W. Va. 687, (17 S. E. 188); *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717.

3. Is this deed of trust void as a preference, under Code, c. 74, s. 2? The clause of the section referred to is in these words: "And every gift, sale, conveyance, assignment, transfer or charge made by an insolvent debtor to a trustee, assignee, or otherwise giving, or attempting to give a priority or preference to a creditor or creditors of such insolvent debtor, or which provides or attempts to provide for the payment in whole or in part of a creditor or creditors of such insolvent debtor, to the exclusion or prejudice of other creditors, shall be void as to such priority, preference or payment so made, or attempted to be made." N. B. Williams was undoubtedly insolvent, from her own showing. She owned nothing at all, but what was covered with debt. The only thing tangible that she had, other than the store, was a piano, bought on the installment plan, unpaid for, with the title reserved. She makes an absolute assignment of the store and fixtures, turning them over to a trustee immediately to secure a single preferred creditor, to the exclusion of all her other creditors. It is true that it was not to secure a debt wholly pre-existing. The statute makes no exceptions as to creditors with regard to when the debt is created, ex-

cept in the case of the "sale, transfer, or assignment of bonds, notes, stocks, securities, or other evidence of debt," but all creditors, without relation to the time when or manner in which their debts were contracted, are placed in the same category, and subject to the same restrictions. In the section as amended by chapter 4, Acts 1895, an exception is contained, in these words: "Provided, further, that nothing in this section shall be taken to prevent the making of a preference as security for the payment of purchase money, or a *bona fide* loan of money, or other *bona fide* debt contracted at the time such transfer or charge was made, or as security for one whom at the time of such transfer or charge becomes an endorser or surety for the payment of money then borrowed." But there is no such provision contained in Code, c. 74, s. 2. The legislature of 1891 did not intend to place in the hands of a debtor the power of rendering the law of no effect. By borrowing money and giving a trust lien on his property, he could defraud all his pre-existing creditors, or prefer any one of them he pleased, to the exclusion of all the rest, if such had been the law. Far better would it be to have no law than to have one so easily evaded. In the case of *Wolf v. McGugin*, 37 W. Va. 552 (16 S. E. 797), it was held: "The form of the instrument or act by which the preference forbidden by the statute, whether by deed of trust, assignment, or sale, is accomplished, is not material, so that it results in such a preference, it being the design of the statute to prevent an insolvent debtor from devoting his property to work a preference among his creditors." In other words, the insolvent debtor's property being limited, the design of the law is to prevent his disposition thereof in such manner as to have the same applied on some of his debts, to the exclusion of others, and to cause the same to be divided *pro rata*, that all may share alike. As is said in the case of *Johnson v. Riley*, 41 W. Va. 146 (23 S. E. 698), there are three ways in which an insolvent debtor may dispose of his property without infringing the statute: First, to a *bona fide* purchaser for value without notice; second, to secure all his creditors *pro rata*; third, to satisfy specific liens on the property involved. But he can not convey the same to a trustee to secure one creditor to the exclusion of others. In case his

debt is *bona fide* and just, this determination is apparently harsh as to the creditor Kisar, but he is presumed to have been fully advised as to the law; and he knew that the grantor was largely indebted, and voluntarily placed himself in the position of a creditor, subject to the provisions of the statute. With the information he had, he should have seen that the money furnished by him went to pay the debtors of N. W. Williams, for his own protection, if not for that of others. Then his deed of trust might have been ample, and he would not have been called upon to share it with the other creditors. Having failed to do so, and obtained an exclusive preference, though he was the latest arrival, the law places him on an equality with those who have borne the heat and burden of the day. That he should lose a *pro rata* share of his debt is no more than all the other creditors do. The law as it now exists makes an exception that apparently would be favorable to him had his trust lien been created after the 16th day of February, 1895. This, however, will depend upon what construction may be hereafter given to the meaning of the words "*bona fide* loan." As the law was at the time of the creation of his trust, his preference must be held void, and the property subject thereto must be divided *pro rata* among all the creditors of N. B. Williams.

The appellants claim that goods to the amount of one hundred and eighty-four dollars and forty-six cents went into the store, and were taken possession of and sold by the trustee after the assignment, which had been ordered from it before. The witness O. F. Williams says these goods were ordered before the trust was executed, and were withheld by the appellants; but, on the day the trust was executed, he sent them a check for two hundred and twenty-five dollars on account, and then appellants sent the goods, which were received by the trustee as part of the stock. An agent of the appellants saw the goods in the store, but did not demand them. It is well settled that, where an insolvent person orders goods on credit on the eve of assignment, the title to such goods does not pass, although they were received prior to the execution of the assignment. *Donaldson v. Farwell*, 93 U. S. 631. In the case of *Durell v. Haley*, 1 Paige 492, a judgment and execution were obtained against the defendant Haley on

the 7th August, 1826. On the 8th and 9th he purchased goods from the plaintiff, who had no knowledge of his insolvency, and placed them in his store, where they were levied on by virtue of the execution. The plaintiff filed his bill to recover the goods. The chancellor held the bill maintainable, on the grounds of fraudulent concealment, and decreed a restoration. *Buckley v. Archer*, 21 Barb. 589; *Rawdon v. Blatchford*, 1 Sandf. Ch. 347; *Nichols v. Pinner*, 18 N. Y. 306. In the case of *Root v. French*, 13 Wend. 570, it was held that a creditor who received on his indebtedness goods purchased by an insolvent debtor on credit was not a purchaser for value, without notice of the fraudulent character of such debtor's title. In the present case, the goods, though ordered before, were not sent or received until after, the execution of the trust, of which the appellants were not notified. The trustee, instead of returning them, as he should have done, took possession of them, and put them in the stock. They were sold at retail along with the other goods, and the proceeds thereof went to swell the funds of the trust. To allow their retention, unpaid for, would be to perpetrate a fraud upon the appellants. The implied right of the trustee to sell at retail would authorize him to replenish the stock to a limited extent, and if he does so, and the trust funds are augmented by his purchases, such funds will be held liable for debts thus created by him. *Kyle v. Harveys*, 25 W. Va. 716. It has also been held that property obtained by one through fraudulent practices of a third person will be held under a constructive trust for the benefit of the person defrauded, though the person receiving the benefit is innocent of collusion. 1 Perry, Trusts, § 211. It is true, appellants might have sued at law in trover and conversion, detinue, or *assumpsit*, but this does not deprive them of the right to charge the trust funds in the hands of the trustee for a debt fraudulently contracted. The goods were not sold to the trustee, but he took possession of them, with full notice, and appropriated them to the trust. They are therefore chargeable against the fund. In the case of *Kupferman v. McGehee*, 63 Ga. 255, it is said: "That the account was against the trustee individually did not prevent it from being afterwards treated as a debt of the trust estate, if the articles embraced in it were really

purchased for the use of the estate, were adapted to its use, and the estate took the benefit of them." Also: "Trusts are children of equity; and in a court of equity they are at home,—under the family roof tree, and around the hearth of their ancestor. A court of law may entertain them; but when the case is complicated, especially when it has a flavor of fraud, equity will not banish them, and remit the parties to another forum. Equity delights in protecting trusts, and it delights no less in obliging trustees and trust estates to render to all men their due." 2 Perry, Trusts, § 815*b*.

The decree complained of is reversed, and the deed of trust executed by N. B. Williams on the 21st day of November, 1894, is held invalid as to the preference thereby sought to be created, but as a valid assignment for the benefit of all the creditors of the grantor, subject, however, to the debts created by the trustee beneficial to the trust estate; and this cause is remanded to the circuit court, with directions to settle the accounts of the trustee, and, after the payment of the just and beneficial debts incurred by the trustee in the management of the trust, to disburse the residue of the trust funds *pro rata* among all the creditors of N. B. Williams, and, in doing so, to conform to this opinion and the rules and principles of equity.

Reversed.

CHARLESTON.

GOODWIN v. BARTLETT *et al.*

Submitted February 1, 1897—Decided April 17, 1897.

SPECIFIC PERFORMANCE—Parol Contract—Real Estate—Possession.

In a suit to enforce specific performance of a parol contract or agreement to devise or convey real estate, possession is an essential part performance of such contract. (p. 384.)

Appeal from Circuit Court, Harrison county.

Bill by Elmer F. Goodwin against Mary Bartlett and others. Decree for plaintiff, and defendants appeal.

Reversed.

JOHN BASSELL and J. G. ST. CLAIR, for appellants.

LEWIS C. LAWSON, for appellee.

McWHORTER, JUDGE :

At April rules, 1895, of Harrison County Circuit Court, Elmer F. Goodwin filed his bill in chancery against Mary Bartlett, Elizabeth Sinclair, and others, setting up a parol contract and agreement with one Rebecca Goodwin, his aunt, who was the owner of one undivided half of a tract of sixty-one acres of land, and another tract of four acres, and also held the other undivided moiety of the sixty-one acres under the will of her sister Zippora, during her life, remainder of said undivided moiety to the brothers and sisters of said Zippora in equal proportions. Rebecca lived upon the said sixty-one acres, and had personal property. By the said contract and agreement, made verbally between said Elmer and Rebecca, in May or June, 1892, he was to live with her at her home upon said land, take care of her, and manage her property, during the residue of her life; and, as a remuneration for such services, she was to give him her entire estate, real and personal, at her death. He alleged that he did remain with her according to the terms and requirements of such contract or agreement, but that she died intestate, and without making him any conveyance, by deed or will, of her estate,—setting out in his bill the names of her heirs at law, and alleging that he had fully complied with his part of the contract; that it was a sacrifice to him in the performance of said contract and agreement; that he was offered good positions as a school teacher in high and graded schools in this State, and declined to accept the same on account of said contract; that for all the time he so labored upon said lands and stayed with said Rebecca, and for all the services performed and money expended, he never received any compensation whatever from said Rebecca, or from any one for her use, but always relied upon said contract, and expected said property at her death; and praying that the contract might be specifically enforced, and the heirs compelled to convey to him the entire real estate, and that the personality be applied in payment and discharge of the debts and liabilities of the said decedent. The appellants, Mary

Bartlett and Elizabeth Sinclair, filed their joint answer, denying the allegations of the bill, and putting the plaintiff upon proof, and the other defendants also filed their answers. The property was, by order of the court, placed in the hands of a receiver. Considerable testimony was taken to prove the allegations of the bill, the contract, and the service under it, and rebutting testimony taken by the defendants.

The evidence is somewhat conflicting as to the proof of the contract and the services rendered thereunder, and perhaps is quite sufficient to establish it in a court of law as a claim against the estate; but it is neither claimed in the pleadings, nor shown by the evidence, that the plaintiff was ever placed in possession of the property under such contract. The decisions in Virginia and West Virginia are uniform against the enforcement of contracts of this nature without possession being given under the contract, at least as an essential part performance thereof. In the case of *Reed v. Vannordale*, 2 Leigh 569, James Reed, being wealthy and childless, verbally agreed with his brother Charles, who was poor, and had a large family of children, that if Charles would forego his intention to move to the West, and move to and settle on a tract of land belonging to James, near his residence, James would convey the land to him in fee. Charles, induced by these promises, executed the agreement on his part, but without incurring any expense or loss in so doing. Held, there was neither a meritorious nor valuable consideration to support the agreement, and equity can not decree specific performance against James' heirs. This was a stronger case than the one under consideration, and included possession of the property, but the court refused to enforce it. In *Darlington v. McCooles*, 1 Leigh 36, plaintiff, Darlington, married McCooles's daughter, and was about to remove to another part of the state, under a contemplated contract with one Vanmeter to go into a partnership in the tannery business; and McCooles, in order to induce him to remain, that he might have his daughter near him, told him he would give him certain real estate if he would give up his thought of removal, and would assist him in putting a tannery on the property, and give it to him. He put him in possession of it, and assisted him in improving it, and he

remained on it some thirteen years. Darlington's wife died, leaving a child, for which McCooie, the grandfather, provided, and then refused to carry out his contract to convey the property to Darlington; and the court held, on Darlington's undertaking to enforce the specific performance of the contract, that in such a case, when the donor has received nothing and the donee lost nothing,—for it was claimed that he (Darlington) had had the use of the property all the time free from rent,—and when the chief motive of the gift (a provision for the donor's daughter) is annihilated by her death, and when the father has discharged the moral obligation to provide for her issue, there is nothing to call into action the powers of a court of equity. There is neither a valuable nor a meritorious consideration, without one of which a court of equity will not aid a defective conveyance, much less enforce a bare agreement, even if it were in writing. This was a case in which the donee had been placed in possession of the land, and held it and worked on it thirteen years. In *Frame v. Frame*, 32 W. Va. 463, 475, (9 S. E. 901, 906), the Court holds: "If a donee, being a child, under a parol gift of real estate by a father, take possession and expend money or labor to improve it, as against the donor he stands upon the same footing as a purchaser for valuable consideration. The statute of frauds has no application to the transaction, and equity will compel its specific performance by requiring him to execute his deed to consummate his gift."

On examination of the authorities cited by the appellee, I find in New Jersey the courts have in one or two instances gone to the extent of sustaining contracts of this character without possession. In the case of *Pflugar v. Pultz*, 43 N. J. Eq. 440, (11 Atl. 123), Pultz agreed, in 1883, that, if plaintiff would do his housework and take care of him the rest of his life, he would devise her the house and lot wherein they then lived. In 1886, without sufficient cause, he left, and went to live with M., and conveyed to M., by deed, the property he had agreed to leave to Pflugar. It was there held that Pflugar was entitled to the relief, and that the agreement was not invalid, under the statute of frauds. Yet in this case, where he left to stay with M., he left Pflugar in possession. This case came the nearest to sustaining the appellee in his position of any of his ref-

erences. One of the principal cases relied upon by him is *Neale v. Neales*, 9 Wall. 1: "Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property; and this is particularly true where the donor stipulates that the expenditure shall be made, and, by doing this, makes it the consideration or condition of the gift." So, in quite all the cases referred to by appellee, possession under the contract seems to be indispensable. In his reference to *Benge v. Hiatt's Adm'r*, 82 Ky. 666, where the father of an illegitimate child induced the mother to give up the child to him, and he agreed to educate it and give one thousand dollars, and further agreed to give the child the tract of land on which he lived, the court held that the one thousand dollars contract could be recovered, while he could not be forced to convey the tract of land, because the agreement was not in writing, but the value placed on it by him, of two thousand seven hundred dollars, could be recovered at law in damages.

The court erred in decreeing that the plaintiff, Elmer F. Goodwin, was entitled to the land of which Rebecca died seised.

The second assignment is that the court erred in decreeing to the plaintiff five-eighths of the sixty-one acres, for the reason that Rebecca Goodwin, under the will of Zippora, had nothing but a life estate in the moiety of said sixty-one acres; and, at the death of Rebecca, the estate or interest of said Zippora passed to the other brothers and sisters of said Zippora, and the will of said Zippora should be read as if it had used the words: "I give and devise all my estate, real and personal, whereof I may die seized or possessed, to my sister Rebecca Goodwin, to have and to hold the same during her natural life, then to be equally divided between my *other* brothers and sisters, my sister Rebecca Goodwin is to pay all my debts and funeral expenses,"—such being the manifest intent of the testatrix. The will under which this devise was made reads as follows: "I give and devise all my estate, real and personal, whereof I may die seized or possessed, to my sister Rebecca Goodwin, to have and to hold the same during her natural life, then to be equally divided between my brothers and

sisters. My sister Rebecca Goodwin is to pay all my debts and funeral expenses." Rebecca took nothing under this will but a life estate in the real property, and, she being the owner of but one undivided half thereof, her heirs could take but the one-half; and, if plaintiff was entitled to recover at all, he could recover but one-half, or four-eighths. Hence the court erred in giving him five-eighths of the sixty-one acres. The appellee has mistaken his relief. If he is entitled to any thing, it is in the nature of a claim against the estate of Rebecca Goodwin for services rendered and money expended for the decedent under the alleged parol contract, and not for a specific performance thereof.

For the reasons assigned herein, the decree complained of is reversed, with costs to the appellee, and the cause remanded for further proceedings to be had therein, to enable plaintiff to prosecute his said claim against the estate if he so desires.

Reversed.

CHARLESTON.

SHANK v. GROFF *et al.*

Submitted February 3, 1897—Decided April 17, 1897.

1. DEEDS—*Mortgage—Evidence.*

Though a deed be absolute on its face, the real nature of the transaction may be shown by parol evidence or surrounding circumstances, and the deed be held to be a mortgage. (p. 345.)

2. DEEDS—*Mortgage—Assignment—Evidence.*

Where a deed absolute on its face is shown by evidence and surrounding circumstances to be a mortgage, and the grantor, in order to redeem the property, borrows the money from a third party, and the grantee in said deed, by indorsement thereon, assigns the deed to the grantor, and the grantor, by like assignment, transfers the property to said third party, the deed may still be shown by evidence and the circumstances to be a mortgage to secure said third party the money advanced by him to said grantor. (p. 346.)

3. ASSIGNMENT—*Agreement in Writing—Grantor's Right of Redemption.*

A written agreement entered into between said parties on

43	337
45	544
43	337
47	423
43	337
52	94

the day said assignment was made, providing that if said third party had an offer for his interest in said property he was to give said grantor notice, and allow him to take the property at the price offered, if accepted within three months prescribed in the agreement, while it may confer upon said third party a power to sell the property, under the terms of said agreement, does not deprive the grantor of the right to redeem the property. (p. 349.)

Appeal from Circuit Court, Grant county.

Bill by Samuel B. Shank against Samuel Groff and others. From the decree plaintiff appeals.

Reversed.

J. N. McMULLAN, L. J. FORMAN, and F. M. REYNOLDS, for appellant:

GEORGE BAYLOR, for appellees.

ENGLISH, PRESIDENT:

On the first Monday in February, 1893, Samuel B. Shank filed his bill in the Circuit Court of Grant county against Samuel Groff and others, praying that the court might cancel, set aside, and declare null and void two deeds admitted to record on January 23, 1893, in the county court of said county, from Lewis S. Hartman and wife to William B. Given, bearing date the 20th September, 1892, and from Samuel Groff and wife and Mary Keneagy to said Lewis S. Hartman, bearing date on the 8th of May, 1889, copies of which deeds were filed with the bill, and to refer the cause to a commissioner to ascertain and report what was due to Samuel Groff and the Henry Keneagy heirs upon the William Henning interest in said land, to whom due, and in what proportion, and to compel, upon the payment of the money due as stated in the bill, the defendant Samuel Groff and the heirs of Henry Keneagy, deceased, or some one for them, to convey to the plaintiff the legal title to the interest of William Henning in the undivided half of five-eighths of the tracts of land in the bill mentioned and described in the deed from Robert W. Stone and wife to Rhodes; and that the said John H. Keneagy, as guardian, might be restrained from proceeding to sell the infant party's interest in the suit brought by him, and now pending in the court.

The pleadings in this case present for consideration and solution the proper construction and legal interpretation of a certain deed of conveyance from William Henning to Samuel Groff and Henry Keneagy for a portion of the land in the bill mentioned and described, a copy of which is therewith exhibited. The question arises and results from the following transactions, which are set forth in the bill and amended bill, to wit: William Henning became the owner by reason of a conveyance from R. W. Stone and wife of a portion of two certain tracts of land lying in said county containing in the aggregate, nine thousand three hundred and eighteen and three-eighths acres. On the 5th day of March, 1881, said William Henning, in consideration of six thousand two hundred and twelve dollars and thirty-five cents, conveyed the legal title to said portion of the land to Amos Herr; and the bill charges: That, while said deed appears to convey the fee-simple title of said William Henning in said portion of said land, yet in fact said conveyance was made only for the purpose of securing to said Amos Herr the said sum of six thousand two hundred and twelve dollars and thirty-five cents, the consideration mentioned in said deed; and the understanding between the parties to said deed was that whenever said Henning could pay Herr the amount of said consideration, accrued interest, taxes, and expenses connected with the management of said interest in said land, then said Herr was to reconvey the legal title thereto to the said William Henning. That in pursuance of said understanding, on the 31st day of March, 1884, said Henning arranged, through the defendant Samuel Groff, and one Henry Keneagy, to pay to said Herr the amount he held against the said interest which had been conveyed to him by said Henning and wife. As soon as said Henning had completed arrangements, and had paid off to said Herr the amount he held against said interest, which on March 31, 1884, was the sum of eight thousand and two dollars and twenty-one cents, then said Herr and wife, on the same deed that Henning and wife had executed to him as aforesaid, indorsed an assignment or transfer of said interest back to said Henning, by which said Herr and wife transferred and set over to the said William Henning all their right, title, and interest in said deed, and in the lands therein conveyed,

which assignment and transfer were duly recorded. That, on the same day the said Henning received said assignment from said Herr and wife, the said Henning and wife on the same deed that the Herr assignment was indorsed, assigned to Samuel Groff and Henry Keneagy all their interest in said deed and properties and lands thereby conveyed, in consideration of twelve thousand dollars, which assignment was also recorded; and the bill charges that said assignment by William Henning to Samuel Groff and Henry Keneagy was not made as the absolute conveyance of the fee-simple right and title of the said William Henning in his interest in said land unto Samuel Groff and Henry Keneagy, but said conveyance was made only for the purpose of securing to Samuel Groff and Henry Keneagy the amount of twelve thousand dollars, the consideration mentioned therein, and whatever interest might accrue, and the taxes that said Groff and Keneagy should have to pay upon the interest aforesaid.

On the same day the assignment and transfer last above mentioned were made, William Henning, Samuel Groff, and Henry Keneagy entered into a written agreement declaring the conditions of the trust upon which said Groff and Keneagy were to hold the interest of William Henning in said land, which agreement was signed and acknowledged by all the parties, and, together with said assignment, was delivered to H. M. North, attorney for Samuel Groff and Henry Keneagy, which agreement was duly recorded. The trust, as declared in said agreement, is as follows: That said Groff and Keneagy, when they sell and convey the undivided half of five-eighteenths of said tract of land, will deduct from the purchase money the sum of twelve thousand dollars, and interest thereon from the date thereof, and all taxes that shall have been paid by them to the time of sale, and that they will then pay over to said Henning the half of what remains of said purchase money, after making the said deductions. It was further agreed that at any time said Rhodes, Shank, and Herr agree to sell their interest in said land, in order that the same might be sold as a whole, Groff and Keneagy should sell their interest at the same time, to the same party or parties, for the same consideration, in proportion to their

respective interest, but they should not be required to sell their interests for a sum less than the amount invested by them, with interest and taxes. It was further agreed that Groff and Keneagy should not sell their interest in said land to any party or parties, other than parties who might buy the whole tract of nine thousand, three hundred and eighteen and three-eighths acres, without first giving to said Henning notice of any proposed sale, and the privilege for any reasonable time thereafter to buy said land at such price as they might be willing to sell for to other persons, which reasonable time should not exceed three months. This agreement should include and be applicable to the heirs, executors, administrators, and assigns of said parties. If said Henning should decide to buy said interest of said Groff and Keneagy at a price they offer to accept from other parties, the terms of sale should be the same to him as offered to other parties, and he might deduct any amount of money that he (Henning) might be entitled to under that agreement. The plaintiff charges that the true intent and purpose of said agreement was to show that said William Henning held the equity of redemption of his interest in said land, and that he had a right to demand the conveyance of the legal title thereto from Groff and Keneagy whenever he repaid to them the amount of money he had advanced for him; and that if a sale of said interest should be demanded by Groff and Keneagy, before Henning could redeem the same, Henning should have reasonable notice of the attempt to sell said interest, and that he should have the refusal of the same, and it was incumbent upon Groff and Keneagy to act in the utmost good faith with Henning to carry into effect the true intent and purpose of said declaration of trust.

Without following consecutively the allegations of the bills and amended bills, or the answers that put those allegations in issue, I regard it as only necessary, for the purposes of this opinion, to call attention to certain prominent facts which must have a controlling influence in reaching a proper conclusion in passing upon the errors assigned and claimed to exist in the decree complained of. Among these facts may be mentioned, first, the execution of the deed bearing date the 5th day of March, 1881, from William Henning to Amos Herr (which is claimed to have

been a mortgage); the assignment of said deed or mortgage from Amos Herr and wife to William Henning, dated March 31, 1884, which assignment was indorsed upon said deed; the assignment by William Henning and wife to Samuel Groff and Henry Keneagy of all of his right, title, and interest in said deed on the same day, which assignment was also indorsed on said deed; the agreement or declaration of trust dated the same day between Groff, Keneagy, and Henning, which has been above recited; the deed dated April 15, 1891, from William Henning to the plaintiff, Samuel B. Shank; the contract between Samuel Groff and the heirs of Henry Keneagy, deceased, and William B. Given, to sell him Henning's interest in said tract of land; the registered letter written November 20, 1888, by Keneagy and Groff to Henning, informing him that they were offered sixteen thousand dollars, payable April 1, 1889, for their interest in the West Virginia land, which offer they would accept, unless, in accordance with the terms of said agreement, he wished to take it, requesting him to regard that letter as notice to him, and requesting him to let them know within three months whether he wished to take the property; the reply to said letter, dated December 6, 1888, written by said Henning, in which he acknowledged the receipt of said registered letter, and states that, in accordance with their agreement, he would take the property.

Depositions were taken by both plaintiff and defendants in the cause, and on the 7th of March, 1896, a decree was rendered therein, holding that a deed executed by Samuel Groff and wife and Mary Keneagy, devisee of Henry Keneagy, deceased, to Lewis S. Hartman, and the deed of Lewis S. Hartman, and Mary, his wife, to William B. Given, in the bill and amended bills mentioned, were null and void; and that the transaction between William Henning of the one part, and Samuel Groff and Henry Keneagy of the other part, on the 31st of March, 1884, conveying the interest of William Henning in the land in the bill and proceedings mentioned, as evidenced by the written instruments executed between them at that time, was not a mortgage, but a sale of the interest of said Henning in said land, subject to the provisions contained in the agreement between William Henning of the one part,

and Samuel Groff and Henry Keneagy of the other part, entered into on the 31st of March, 1884. The court further held that William Henning never repurchased the undivided half interest in five-eighths of the land in the bill mentioned from Samuel Groff and Henry Keneagy, but that Samuel B. Shank was entitled, by purchase and assignment, to the rights and interests of the said William Henning under said agreement of March 31, 1884, between Henning, Groff, and Keneagy; and the court further held that William B. Given had become the owner of all rights and interests of Samuel Groff and Henry Keneagy under the instrument of writing and the agreement aforesaid. The court further held that the true construction of said agreement was as follows: That William Henning sold his interest in the land therein mentioned to Samuel Groff and Henry Keneagy, reserving the right to require them, before selling such interest purchased by them to any party or parties other than the parties who might purchase the whole tract of nine thousand three hundred and eighteen and three-eighth acres mentioned therein, to give said Henning notice, as provided by said agreement, of any offer they might have for said interest, which they were willing to accept, said Henning to have the right, within the time prescribed by the agreement, to purchase such interest at the price and upon the terms of said offer; that this agreement also required said Groff and Keneagy to sell said interest in this land whenever C. J. Rhodes, Jacob Shank, and Daniel Herr sold their interest in the land therein mentioned, provided that said Groff and Keneagy should not be required to sell such interest for less than twelve thousand dollars, with interest thereon from March 31, 1894, and the taxes that might have been paid by them on said land since March 31, 1894; that whenever the said interest in this land should be sold by Groff and Keneagy, or their assigns, after deducting the sum of twelve thousand dollars with interest thereon from March 31, 1884 (the date of said agreement), and the taxes paid by them from that date up to the time of sale, the residue of the proceeds should be equally divided between said Groff and Keneagy or their assigns, and the said William Henning and his assigns. The plaintiff requested the court to determine, in addition to what was decided in this

decree, what rights, if any, the plaintiff had in the land involved in this suit, and what rights, if any, the plaintiff had to the rents and profits of said land, and in the lumber cut from said land, and what rights, if any, the plaintiff had to have said land sold or to demand of William B. Given to sell said land, which relief was refused by the court, and from this decree this appeal was applied for and obtained.

The first assignment of error relied upon claims that the court erred in deciding that the assignment made March 31, 1884, by William Henning to Samuel Groff and Henry Keneagy, of the William Henning interest in the land in the bill mentioned, was not a mortgage. In considering the question raised by this assignment of error, and the propriety of this portion of the decree, we must first look to the true character and legal effect of the deed from William Henning and wife to Amos Herr, which on the face of it appears to have been an absolute conveyance of said Henning's interest, but which is shown by the testimony in the cause, and by the manner in which it was subsequently treated by the parties thereto, to be merely a conveyance to secure a repayment to said Amos Herr of the sum of six thousand two hundred and twelve dollars and thirty-five cents, the consideration mentioned in said deed. Amos Herr, in his deposition, in answer to the following question: "You have stated that you held this deed as collateral. For what sum of money or property did you hold it as collateral?" Answered: "For money he owed me, mentioned in the deed." And in reply to the question, "I see that the consideration named in said transfer is stated at \$8,002.21. Now, please state what constituted said consideration,"—answered, "Money that I loaned him, principal, interest and taxes." William Henning in his deposition says that the conveyance to Herr was executed as security for six thousand two hundred and twelve dollars and thirty-five cents borrowed by him from said Herr; that he had the money from March 5, 1881, until March 31, 1884, when the debt amounted to eight thousand and two dollars and twenty-one cents; that he borrowed twelve thousand dollars from Groff and Keneagy, eight thousand and two dollars and twenty-one cents of which amount was to pay Herr, and the balance to start up in the grain busi-

ness. A question is raised by exception to the competency of the testimony of Henning on account of said Keneagy being dead at the time said evidence was given. This exception, however, I do not regard as well taken, because Groff was examined in regard to the transaction, and North, who appears to have owned one-fourth of the interest of Given as assignee from Keneagy's estate, also testified in regard to the same transaction.

That a deed absolute on its face may be shown, by oral testimony and the surrounding circumstances, to be a mortgage, has been more than once held by the decisions of this Court. The case of *Kluck v. Price*, 4 W. Va. 4, was a case somewhat similar to the one under consideration in its facts, which facts were set forth in the second point of the syllabus as follows: "P. and K. were citizens of New York. P. owned lands in this State, and employed K. as an agent to come to this State, and endeavor to sell the same. K. failed to make sale, and, learning from P. that he was in straitened circumstances for money, proposed to loan him money at rates that were exorbitant and usurious, if he would execute to him a deed for the land as security. P. executed a deed that was absolute and in fee-simple on its face, and K. executed on the same day an agreement to P., stipulating that he might elect to repurchase the land in 3 months, for a certain sum, and certain other and greater sums, in 6 and 12 months, respectively, if he would so elect at the expiration of 6 months from the date of the agreement, which sums were largely in excess of the consideration expressed in the deed, and 6 per cent. interest thereon. K. refused to permit P. to repurchase after failure to elect at the expiration of 6 months, claiming that the sale and deed were absolute. P. filed his bill to cancel the deed, alleging that the transaction was only for the security of money, and was usurious in its character. The proofs in the cause tended to show that the transaction was a loan of money, and the land was held as security. Held, that the transaction was in effect a mortgage, and that P. was entitled to redeem the land upon the payment of the consideration expressed in the deed, with the interest thereon." In support of this proposition, see, also, the case of *Lawrence v. Du Bois*, 16 W. Va. 443; *Davis v. Demming*, 12 W. Va. 247; *Hoff-*

man v. Ryan, 21 W. Va. 415, second point of syllabus; *Gilchrist v. Beswick*, 33 W. Va. 168 (10 S. E. 371), first point of syllabus; *McNiel's Ex'rs v. Aldridge*, 34 W. Va. 748 (12 S. E. 851).

Considering the testimony in this cause in the light of the authorities above cited, I am led to the conclusion that the deed from Henning to Herr must be regarded as a mortgage, and, such being the case, we come next to consider the effect of the assignment and transfer of said mortgage from Herr to Henning and from Henning to Groff and Keneagy. We find the law stated in *Jones on Mortgages* (section 805) as follows: "The fact that an assignment was made at the request of the mortgagor, to one who advanced him money at the time, is evidence of an agreement between the parties that the mortgage should no longer continue a security for the payment of the debt which it was originally given to secure, but should be security for the debt then created." It appears from the testimony in this case that Henning borrowed the money from Groff and Keneagy to discharge his debt to Herr, secured by said deed, and when paid Herr assigned the deed to Henning, who assigned it to Groff and Keneagy to secure the money borrowed. Henning only held the equity of redemption while Herr held the deed. The consideration was paid by Groff and Keneagy for the assignment, and, although the assignment was made to Henning, yet Henning on the same day assigned said deed to Groff and Keneagy, both assignments being made by indorsement on the Herr deed. The effect of these assignments was merely to allow Groff and Keneagy to step into the shoes of Herr as to said mortgage, and thus said Groff and Keneagy became the holders of said deed as security for the money loaned and advanced by them to discharge the Herr debt. Another circumstance which may throw some light upon the intention of the parties to these transactions is the language used in making the assignments, the same language being used in each. No words of grant or conveyance are found therein, such as are usually found in a deed, but, after mentioning the consideration, they assign, transfer, and set over to the parties, naming them, their heirs and assigns, all their right, title, and interest in the within deed, and the properties and lands thereby conveyed.

showing that the intention was in each instance to transfer the interest held by the assignor in said deed, whatever its character might be, and, as I think, clearly to transfer the security conferred upon Herr by said mortgage to Groff and Keneagy.

We come next to consider the agreement entered into the same day between Groff, Keneagy, and Henning, and from that paper it is apparent that it was not the intention that Groff and Keneagy should take the absolute title to the interest in said land which was mortgaged by Henning to Herr, because it is provided therein that, if said Groff and Keneagy sold said interest, they were to deduct from the purchase money the twelve thousand dollars they had loaned to Henning, with the accrued interest thereon, and the taxes which they might have paid; and it was further provided that if said land was sold for an amount more than sufficient to pay said twelve thousand dollars, interest and taxes, they were to pay to William Henning one-half of the surplus, retaining the other half. It was further agreed that, at any time the parties interested in said land wished to sell the same as a whole, Groff and Keneagy were to sell their interest at the same time, but they should not be required to sell for a sum less than the twelve thousand dollars invested by them, interest and taxes,—showing that the object was to secure said twelve thousand dollars. It was further agreed that said Groff and Keneagy should not sell their interest in said land, to any party other than those who bought the whole tract, without giving Henning notice of such proposed sale, and the privilege, for a reasonable time thereafter, to buy said land, not to exceed three months, which agreement was to include and be applicable to the heirs, executors, and assigns of the parties; and if said Henning should decide to buy said interest from Groff and Keneagy at a price they offered to accept from other parties, he was allowed to purchase upon the same terms as was offered to the other parties, and to deduct any amount of money from the purchase money that he (Henning) might be entitled to under this agreement. On the 20th day of November, 1888, John H. Keneagy, executor of Henry Keneagy, and Samuel Groff, wrote to William Henning, who was then residing in Illinois, by registered letter, informing him that they

were offered sixteen thousand dollars for their interest in this West Virginia land, and informing him that they would accept it unless, in accordance with the agreement, he wished to take it, which letter was replied to by registered letter on December 6, 1888, notifying said parties that he would take the land at that price. Nothing further was heard from said Groff and Keneagy by Henning, and on the 15th day of April, 1891, William Henning conveyed all of his interest in the land to the plaintiff, Samuel B. Shank. In the fall of 1891 it appears that the plaintiff, Samuel B. Shank, went to John H. Keneagy, executor, *etc.*, and Samuel Groff, and offered to pay them the money they had advanced to William Henning, with its accrued interest and taxes, which they declined to receive, although he showed them the letter which they had written to Henning; and on the 27th of April, 1892, said Samuel Groff and the heirs of Henry Keneagy, deceased, conveyed all their interests in said land to William B. Given for the sum of eighteen thousand seven hundred and twenty-seven dollars and seventy-four cents, the same being the amount which was due them for money advanced to Henning, with the interest thereon and taxes. Said William B. Given had full notice of the rights acquired by the plaintiff from Henning, and it appears from the evidence in the cause that he went to Henning, and offered him five thousand dollars for his interest in said land, which Henning declined, informing him that he had sold his interest to the plaintiff, Samuel B. Shank. The evidence in this case clearly indicates that not only Samuel Groff and the executor of Henry Keneagy had full notice of the rights of William Henning and the plaintiff as his grantee, but that William B. Given also had full notice of the rights of the plaintiff derived from said Henning, and he cannot be regarded in any sense as an innocent purchaser of the interest of the plaintiff or William Henning. The circumstances shown by the evidence in the cause also fully establish that the deed from William Henning to Amos Herr, although absolute on its face, was intended as a mortgage, and the indorsements made thereon did not in any manner change its character. The agreement entered into at the same time between Groff, Keneagy, and Henning also shows on

its face that the entire object of the transaction was to secure to Groff and Keneagy the amount of money advanced by them to Henning, and, in the event of a sale of said land for any amount in excess of the amount thus secured, to allow said Groff and Keneagy one-half of the profits thus arising as a premium on the money loaned; and containing a further clause, which allowed Henning or his assigns to redeem the said land in the case of a proposed sale by Groff and Keneagy, to any party or parties other than parties who should buy the whole tract, by paying the amount offered by such parties, and allowing him to deduct any amount from the purchase money that he might be entitled to under the agreement.

In the case of *Hoffman v. Ryan*, 21 W. Va. 415, this Court held that "though a deed be absolute on its face, and a contract is made at the same time in writing between the grantor and the grantee, whereby the grantee is authorized to sell the land or a part of it in a specified time, and to pay back the consideration for the deed, yet, in the absence of parol proof to the contrary, such deed will be regarded as a mortgage." In the case of *Davis v. Demming*, above cited, GREEN, PRESIDENT, in delivering the opinion of the court, said: "A conditional sale, with the right to repurchase, very nearly resembles a mortgage. The distinction is that if the money advanced is not loaned, but the grantor has a right to refund it in a given time, and have a reconveyance, if the debt remains the transaction is a mortgage; otherwise not. In case of doubt, however, a court of equity will always lean in favor of a mortgage rather than a conditional sale." The evidence in this case shows that William Henning signified his willingness to take said property at the price of sixteen thousand dollars within the time prescribed in said agreement. It also shows that said Henning was ready to comply with his offer. The plaintiff, as a grantee and assignee of the rights of Henning, had a right to pay the money interest and taxes due to said Groff and Keneagy in redemption of said land, and they had no right to refuse the same, and afterwards convey the same to William B. Given for the amount due them, including interest and taxes. My conclusion, therefore, is that the court erred in holding that this deed, though absolute on its face, was not shown to be

a mortgage by the evidence and the circumstances attending its execution and transfer, including the written instruments executed between the parties at the time.

I am further of opinion that the circuit court erred in holding that William B. Given had become the owner of all the rights and interests of Samuel Groff and Henry Keneagy under the instrument of writing and agreement aforesaid. The court also erred in construing said agreement to the effect that William Henning sold his interest in the land therein mentioned to Groff and Keneagy, reserving the right to require said Groff and Keneagy, before selling said interest purchased by them to any party or parties other than those who might purchase the whole tract, to give said Henning notice, as provided by said agreement, of any offer they might have for said interest, which they were willing to accept, said Henning to have the right within the time to purchase said interest at the price and upon the terms of said offer. If the written agreement between Henning, Groff, and Keneagy could be considered as conferring a power of sale upon Groff and Keneagy, yet it did not take from Henning or his grantee the right to redeem the land. The plaintiff, Samuel B. Shank, had the right to redeem the property by paying the amount due upon the mortgage, with its interest and the taxes, and Groff and Keneagy had no right to refuse it; neither could they sell the property after the offer to redeem. Before selling the property subsequently they were bound, under the agreement, to give Henning, or the plaintiff as his grantee, notice, and allow one of them to take the property by paying the amount which they were offered, if Henning or plaintiff accepted the proposal within three months. For these reasons the decree complained of must be reversed, with costs.

Reversed.

CHARLESTON.

TAYLOR v. DORR.

Submitted January 29, 1897—Decided April 17, 1897.

PARTNERSHIP—Compensation of Partner—Special Agreement.

One partner is not entitled to compensation for his services in the common business, though they may exceed those of his co-partner, in the absence of a special agreement. (p. 352.)

Appeal from Circuit Court, Webster county.

Suit by A. L. Taylor against C. P. Dorr. Decree for defendant, and plaintiff appeals.

Affirmed.

A. L. TAYLOR and L. M. LA FOLLETTE, for appellant.

MOLLOHAN & McCLINTIC, for appellee.

BRANNON, JUDGE:

C. P. Dorr and A. L. Taylor formed a partnership for the practice of law, which continued a short time. After dissolution, Taylor sued Dorr for a settlement of the partnership accounts, and the case was referred to a commissioner, and upon his report a decree was entered in favor of Dorr against Taylor, and Taylor appeals. The commissioner returned a report merely stating that Dorr claimed a certain account and Taylor a certain account, and that the evidence was conflicting, and decided nothing himself, but referred all matters in difference to the decision of the court, and the court then made an order saying, "This cause is recommitted to Commissioner C. B. Conrad to complete his report;" and then Conrad—it is said, without notice—did file a report finding a balance in favor of Dorr, which was carried into decree by a special judge. Taylor filed nine exceptions to the report.

One of his points against the decree is that the case was heard at the first term after the report was filed. Ordinarily this is error, under the case of *Findley v. Smith*, 42 W. Va. 299 (26 S. E. 370); but the reason of that decision has no application here, because Taylor did file exceptions

to this report, and therefore had the benefit of the delay which the statute gives. The whole object of the statute was accomplished in his favor by his filing exceptions. He did not at any subsequent time offer any other exceptions, or take any other steps in the case. If, even, he could have tendered any exceptions at the next term after the entry of this decree, he did not offer them.

Another exception is that the order did not authorize another settlement. In fact, there had been no settlement by the commissioner. Taylor says that the report was vague in the fact that it states that he was indebted to Dorr on settlement of partnership accounts twenty-one dollars and thirty-eight cents, and then goes on and brings Taylor out in debt ninety-one dollars and thirty-five cents. Now, the commissioner distinctly states that that twenty-one dollars and thirty-eight cents is a balance shown in favor of Dorr by Exhibits 1 and 2, and it enters only as one of the tabulated items from which the balance of ninety-one dollars and thirty-five cents is taken. Other distinct items are combined with it, and they together make up the balance decreed. Taylor excepts, because the evidence before the commissioner is clearly in favor of the plaintiff, entitling him to recover three hundred and seventy-eight dollars and seventy-five cents. Turning to the Taylor account, filed with his deposition, he says that Dorr is indebted to him in certain amounts, specifying them, amounting to three hundred and eleven dollars and seventy-five cents. One of the items therein is two hundred and fifty dollars for work in the partnership over and above his equal share of the partnership business. I know no law which, in the absence of special agreement, measures the labor of one partner by that of the other, and allows one for any balance of work done by him over that done by the other. The law is well settled that one partner is not entitled to claim compensation for his services in business without a special contract for compensation, though one partner attends almost exclusively to the business. If there is no agreement for compensation to him, he is not entitled to compensation therefor. *Forrer v. Forrer's Ex'rs*, 29 Grat. 134; *Patton v. Calhoun's Ex'rs*, 4 Grat. 138, denies even a surviving partner compensation for settling up the partnership business. The article of partner-

ship provided for a half fee in new cases to each one, and gave Taylor on old cases one-fourth the fees. This claim would be repugnant to that agreement in writing. But Taylor says that after it was executed they made a special agreement that Dorr was to pay Taylor a reasonable compensation for his services in suits in which Dorr was a party. Dorr swears that no such agreement was made. It seems improbable from the fact that that agreement shows the parties contemplated such cases when they formed the partnership, for it expressly says that Taylor should attend free of charge to all cases in which Dorr was a party, and Dorr should likewise attend to all cases in which Taylor was a party. The evidence of the two conflict on this matter. The commissioner in the circuit court found with Dorr on it. Every presumption is made in favor of the correctness of the decision of the commissioner. If the evidence is conflicting, the lower court rarely interferes with his finding on the facts. Much more so is this the rule in the appellate court, when that finding has been approved by the circuit court. *Hartman v. Erans*, 38 W. Va. 670 (18 S. E. 810); *Reger v. O'Neal*, 33 W. Va. 159 (10 S. E. 375). Another charge in Taylor's account is for half of a sixty dollar item for taking care of the law office, sweeping and cleaning the same, and making fire therein. There can be no such charge as this. Partners do not charge each other with such items. Of course, money actually outlaid in keeping the law offices in order would be a different thing under agreement or usage of the partners, but there are no circumstances shown in this case to justify that charge. The cleaning and warming of the office was for the benefit of one partner as well as the other. The office belonged to Dorr; the library belonged to Dorr. Taylor had the use of both and no charges were made by Dorr therefor, and surely they would offset this claim for cleaning and warming the office; and Dorr swears that he attended to that largely himself, and the commissioner was found against that item. Taylor charges half of the salary paid to a type-writer, fifty dollars, and the commissioner allowed half of forty dollars for this charge, so there is here a discount of only five dollars; and the commissioner has allowed Taylor half of the charge made against the firm for coal, so that all that was tenable

of the account filed by Taylor with his deposition was allowed. Charges against Taylor are made by the commissioner for various fees collected, of small amount; one, the fee of Chapman of forty dollars, half charged to Taylor. Taylor admitted that he collected it. And also a Harlow fee of ten dollars, and also some of the Isenhardt commission, and the other items debited to him are supported by evidence satisfactory to the commissioner and circuit court. If any errors could be sustained to any items charged to Taylor, they would fall far below one hundred dollars, the amount of jurisdiction of this Court. Taylor, after the dissolution, sold all his interest in the law firm, including all fees and claims due the firm, and all suits and fees to become due in the firm suits, to H. C. Thurmond, and of course had no longer any interest in what yet remained to be collected.

The most serious point presented by the applicant is that no notice was given him of the time and place of the completion of the report by the commissioner. When the commissioner first had the case before him, both sides took evidence and filed papers. When it went back to him, no further evidence was taken, no papers filed, and nothing further done. The commissioner simply, upon the materials already in the case, under the notice theretofore given, determined what items he would allow and disallow to and against the parties. The first question that occurs here is whether, considering that this was an order not simply recommitting the case, or referring any other matters, but simply that the commissioner should, upon the materials already in the case, complete his report, it required notice. I do not think so. The parties had had their full day before the commissioner, and this simply was action by the commissioner in deciding upon the matters already shown before him. In *Gardner v. Field*, 5 Gray, 600, it was held that an assessor to whom a case is recommitted to reassess the damages according to a rule laid down by the court may proceed to assess the damages without a rehearing, if the case was previously fully heard before him. In that case—almost similar to this—the assessor had made a report in the alternative that, if one theory should be adopted, he fixed the damages at one sum, and, if on a different basis, a different sum, and it was recommitted, and he

made a second report, fixing the damages at a certain sum, without further notice, and without evidence or hearing; and Chief Justice Shaw says: "Whether the assessor should give notice to the parties, and hear further evidence, upon a recommitment, appears to us to depend upon no fixed rule, but upon the circumstances. Upon a general recommitment, and without special instruction, *prima facie* we should think it would be necessary to give notice. To hear the parties before deciding a matter of controversy seems to lie at the foundation of justice. But where, from the nature of the objections, and the grounds on which a recommitment is ordered, it is manifest that the object is to enable or require the assessor to revise his own doings in form or substance, or to correct some error of his own, requiring no new evidence or argument, notice is not required. The assessor states that he had a full report of the evidence and full minutes of the argument. The recommitment was to enable him to make a positive, instead of an alternative, assessment upon the exercise of his own judgment on the materials already before him. We think the objection to this report that he gave no notice and had no further hearing is not well founded." in *Kellogg v. Putnam*, 11 Mich. 344, where there was a reference to compute the amount on a basis fixed by the interlocutory decree, and no inquiry into the facts is to be had, the defendant is held not entitled to notice of the confirmation of the report or of the hearing thereof. It does not appear from the commissioner's report whether Taylor had notice served upon him, but in one of his exceptions he says that he or his attorney was not notified that the settlement was to be made up for that term of court, but, on the contrary, he and his counsel understood that it would not be, from which we may fairly infer that they knew of the proceedings before the commissioner. In *McCandlish v. Edloe*, 3 Grat. 330, it was held, where a notice had been published by a commissioner, and one made complaint that he had no personal notice, he must show by his own affidavit or otherwise that he had no such information of the proceedings of the commissioner as would have enabled him to attend. In *Whiteside v. Pulliam*, 25 Ill. 285, it was decided that under the Illinois practice in chancery—which is very similar to ours—there must be affidavit to

support an exception to a report denying notice of the hearing before the master, and showing that the attorney also had no notice. I am not to be understood as saying or intimating that parties have not clearly the right to have notice of the time and place fixed by commissioners in chancery for executing orders of reference. Our statute and the uniform practice require this. But under the particular circumstances of this case, it being simply the completion of the commissioner's report upon material already in, and the parties having appeared before the commissioner when it was first before him, and taken their evidence, and developed their cases, and it seeming that the parties had knowledge in fact of the commissioner's action, we do not think that we ought to reverse the case for that cause.

There was a petition of H. C. Thurmond filed in this case, setting up his assignment from Taylor, but it was foreign to the case, and no decree was entered thereon prejudicial to Taylor, and, while it is mentioned in the assignment of error, it is not insisted upon in argument, and no prejudice was done to Taylor on its account. Therefore we affirm the decree.

Affirmed.

CHARLESTON.

CHRISLIP *et al.* v. TETER *et al.*

Submitted February 2, 1897—Decided April 21, 1897.

1. EQUITY PLEADING—*Fraud*.

When fraud is sufficiently alleged, with proper parties to a bill, a demurrer will not lie. (p. 364.)

2. EQUITY JURISDICTION.

"When a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved to avoid a multiplicity of suits." *Hanly v. Watterson*, 39 W. Va. 214 (19 S. E. 536.). (p. 365.)

3. REVERSAL—Appellate Court—Review on Appeal.

"Where a decree sought to be reversed is based upon depositions which are so conflicting, and of such a doubtful and unsatisfactory character, that different minds and different

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judges might reasonably disagree as to the facts proved by them, or the proper conclusion to be deduced therefrom, the Appellate Court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the Appellate Court might have pronounced a different decree if it had acted upon the cause in the first instance." *Smith v. Yoke*, 27 W. Va. 639. (p. 366.)

4. FRAUDULENT CONVEYANCE—*Decree—Error.*

When, in a suit to set aside a deed of conveyance as fraudulent and void as to plaintiff's debt, and to sell the real estate therefor, the court ascertains and decrees that it is so fraudulent and void, it is error not to decree further, and set aside said deed and provide for the sale of the property conveyed to pay the debt. (p. 366.)

5. FRAUDULENT CONVEYANCE—*Decree—Error.*

In any such suit it is error to decree the sale of another tract of land of the defendant for the satisfaction of said debt, the conveyance of which has not been attacked, or said tract mentioned in the pleadings, and upon which plaintiff has no lien. (p. 367.)

6. FRAUDULENT CONVEYANCE—*Appellate Court—Jurisdiction.*

In such suit, where the defendant filed his answer in the nature of a cross bill, and praying affirmative relief, and the court failed to take any action thereon, or to adjudicate in the matter of said affirmative relief, in the absence of such action there is nothing of which the Appellate Court can take jurisdiction. (p. 367.)

Appeal from Circuit Court, Barbour county.

Bill by Chrislip Bros. against John Teter and others.
Decree for plaintiffs, and defendants appeal.

Reversed.

DAYTON & DAYTON, W. T. ICE, and F. O. BLUE, for appellants.

SAMUEL V. WOODS, for appellees.

McWHORTER, JUDGE:

On the 13th day of May, 1893, Chrislip Bros. sold John Teter their stock of merchandise at Peck's Run, Upshur county, by the following written agreement: "This article of agreement, made and entered into this the 13th day of May, 1893, between Chrislip Bros., of the first part, and John Teter, of the second part, all of Peck's Run, Upshur County, West Virginia. Said party of the first part agree

to sell their entire stock of goods, consisting of dry goods, notions, boots, shoes, hats, caps, hardware, queensware, drugs, and patent medicines; in fact, everything,—store furniture, stove, scales, coops, cases, tables, lamps, corn, meat, wool, and in fact all things not herein mentioned that belong to the business. All of the above named goods sold at city cost, with ten *per cent.* on. Said party of the first part is to take a house and lot in Burnersville, West Virginia, the same house that Page Henderson now lives in, including saddler shop, blacksmith shop, stable, *etc.*, at eight hundred dollars; six hundred dollars in cash to be paid the first day of June, 1893; one thousand dollars the 1st of October, 1893; the remainder in October, 1894. All with interest from date. The stock of goods to be invoiced in May, 1893, when said party of the second part is ready. Either party forfeiting the contract to pay to the other party one hundred dollars. Witness our hands and signatures. Chrislip Bros. John Teter.” The goods were invoiced on May 22, 1893, and Teter made his two notes of that date for one thousand three hundred and four dollars and sixty cents each, payable on or before the 1st day of October, 1894,—one with interest from date, the other not mentioning interest. At the April rules, 1894, Chrislip Bros. filed in the clerk’s office of Barbour county circuit court their bill in chancery against John Teter, Lloyd A. Teter, Burton I. Teter, Catherine Teter (guardian for said Lloyd A. and Burton I. Teter), John Teter and Granville Teter (executors of Alva Teter, deceased), Ira Ward, and Edward E. Tutt, alleging that on the 20th of May, 1893, defendants Lloyd and Burton Teter were infants, seventeen and nineteen years old, respectively; that on that day their mother was appointed by the county court of Upshur county their guardian, and thereafter had charge of their property, personal and real; that the estate of the infants was all derived by the will of their father, Alva Teter, and amounted to about ten thousand dollars; that Granville Teter and John Teter qualified the 27th of February, 1893, as executors of Alva Teter; that on the 13th of May, 1893, they sold the stock of merchandise as set forth in the above-written contract, and exhibited two notes of one thousand three hundred and four dollars and sixty cents each, alleging that one of them was assigned for value to

Ira Ward, and that both notes remained unpaid. Further, that they had a claim against Teter, assigned to them by E. E. Tutt, for one hundred and fifty dollars, which was unpaid. Allegeing the insolvency of John Teter; that a judgment at law against him would be unavailing; that he was about to leave the State and reside out of the same, and had declared his purpose to do so, and had rendered himself unable to meet his obligations, and had moved to Barbour county, to his mother-in-law's; but on the 22d of May, 1893, said John Teter was believed to be practically out of debt and was then owner of real and personal property worth about ten thousand dollars, and upon the faith and credit thereof plaintiff's permitted him to become indebted to them; that his property consisted of two hundred acres of land, worth at least seven thousand dollars, on which he resided, and had horses, cattle, farming utensils, *etc.*, worth two thousand dollars, and other personal property; that he was also then the owner of the said merchandise, worth five thousand dollars. Further charging that soon after becoming indebted to them he began a systematic and fraudulent disposition of his property, and on the 1st day of October, 1893, sold said stock of merchandise, which he had been retailing for some time, and from time to time replenishing, to Ira Ward, at the price of two thousand three hundred dollars, the same then being worth five thousand dollars, and received in payment therefor from Ward a tract of one hundred and eleven and one-half acres of land, called the "White Land," and paid said Ward the sum of five hundred dollars in money in said exchange, and borrowed from him one thousand dollars, and immediately incumbered the same land with a vendor's lien in his favor for one thousand five hundred dollars; that on the 17th of February, 1894, with fraudulent purpose he incumbered the same tract of land with six hundred dollars, which he borrowed from D. W. Dix and T. E. Kidd, practically incumbering said land for its selling value, and rendering it unavailing to other creditors, and with like fraudulent intent sold all his personal property; that before the sale of all the personal property, on the 23d of November, with like fraudulent intent, by deed he conveyed to his infant brothers, Lloyd and Burton, the farm of two hundred acres, for the

pretended consideration of six thousand six hundred and fifty dollars and seventeen cents, reciting in the deed that the one thousand and twenty-four dollars and thirty cents was in hand, and for the residue, five thousand six hundred and twenty-five dollars and eighty-seven cents, his two infant brothers executed to him their note payable the 4th of December, 1894, and retained a vendor's lien on said land to secure the same, which note Teter had ever since been trying to trade off to whatever person might be foolish enough to buy or discount the same, but refused to discount or sell the same to plaintiffs, who offered to cash the same, less the amount of the said debts. And charging that Lloyd and Burton, as well as their guardian, had notice of such fraud; that at the time of the sale of all his property he was in debt to the amount of six thousand seven hundred and twenty-four dollars, which indebtedness was also known to Lloyd and Burton and their guardian, all of whom were near neighbors, and on terms of the closest intimacy; that the said infant brothers and guardian had notice that he was about to leave the State; that plaintiffs tried to buy his land, and offered to cash the infants' note, and he refused to do it, and they offered him a bonus of two hundred dollars if he would secure their debts, and he refused to do that; that they then requested him to name the sum that would induce him to secure them, which he declined to do, and declared that before he would do so he would "do worse"; that, when they offered to buy the land, John Teter declared to three reputable men that the said two infant brothers wanted him to sell the land, and let plaintiffs go unpaid, but, to deceive plaintiffs, declared at the same time that he would sell the same to any other person for five dollars per acre less than to his said brothers, because they suggested such perfidy to him. Plaintiffs charged that all the said defendants Teters were combining together to hinder, delay, and defraud them; that plaintiffs had filed in Upshur county a *lis pendens*, setting forth the object and title of this suit. And prayed that the deed executed by John Teter on November 23d to Lloyd and Burton be declared fraudulent and void as to the debts of the plaintiffs, and their said assignee, Ward, and the same be set aside as to said debts, and that said debts be declared liens, from the

institution of this suit, upon the lands so conveyed, and that the land be sold to pay the debts of the plaintiffs and their said assignee, and for general relief.

The defendant Catherine Teter, guardian, made her answer, denying all fraud or knowledge of fraud or attempted fraud upon the creditors of John Teter. Alleging that the sale was fair and *bona fide*. Denying the insolvency of John, or that he was attempting to avoid the payment of his just debts. Alleging that he was the owner of a valuable farm in Roane county, fully paid for; that a valuable consideration was paid for the lands, upon the terms agreed; and that she consented to the purchase, believing it to be for the best interest of the parties interested. The infant defendants, in their own name, filed their answer, denying all allegations of fraud, or any knowledge of fraud. Alleging that it was a *bona fide* sale to them; that the money had been paid, and showing that the whole purchase money due to John Teter was paid, down to about one thousand three and seventy dollars. Averring that they had agreed to pay a full and valuable consideration for the land,—more than the same could have been sold for to others,—and expressly denying every allegation of fraud, or imputation of fraud, in respect to the purchase by them of said land, and allegations charging them with fraud in the payment for said land. Alleging that at the time of the sale they knew John was in easy circumstances, abundantly able to pay all his debts and liabilities, and have a large surplus left. Charging that plaintiffs well knew and advised and urged John to make the sale of the tract of land to them, and stated to him that it was the best thing he could do; that the price offered for the land was the full value of it, and, after the sale was made, informed John that he had made an excellent sale to them, and got more for it than any other person would have given. Denying the insolvency of John. Alleging that he was living in Roane county, where he had purchased a valuable farm, paid for with funds received from them for the land he sold them, on which he had plenty of farming implements and personal property; that John sold his stock of goods to Ira Ward for much less than their true value, and that they were advised that said sale was procured by the false scheming of plaintiffs with said Ira Ward; that

they were attempting to oppress said John Teter, and have his creditors oppress him, so as to force him to sacrifice said stock of goods in the sale made to said Ward, while, as respondents charged, plaintiffs were partners with said Ward in the purchase of the goods, and received the full benefit of the fraudulent scheme perpetrated by them upon John. Alleging that the vendor's lien retained in the deed from Ward to John Teter on the White land was fraudulent, fictitious, and without value, and obtained without the consent of John. Denying that he had adopted a systematic sale of his property for the purpose of defrauding his creditors, or making sale of the same for a like purpose. John Teter also filed his demurrer, and, without waiving his demurrer, made answer denying every allegation of fraud. Denying insolvency; that he was ever about to leave the state, or reside out of it. Alleging that he was perfectly solvent and able to pay all his indebtedness; that he was the owner of a valuable farm in Roane county, fully paid for, worth two thousand five hundred dollars or three thousand dollars. Admitting that he sold his stock of merchandise to Ira Ward for the price of two thousand three hundred dollars, as set out in the bill, and took in exchange for said stock of merchandise a farm of one hundred and eleven and one-half acres of land, and further paid said Ira Ward five hundred dollars in addition to the goods traded; that he gave a vendor's lien on the White land, but it is not true that it was done to delude or defraud the creditors. Charging that the plaintiffs had full knowledge of the transaction, and that the one thousand and five hundred dollar lien was retained by Ward as a mask to hide himself and the plaintiffs while they might defraud and ruin him; that the one thousand and five hundred dollars was made up as follows: Five hundred dollars difference between the stock of merchandise and the farm, and a one thousand dollar note due upon the stock of merchandise, for which the plaintiffs were then pushing collection, and that said one thousand dollar note was afterwards and within a very short time, turned over to him by Ward, acting for the plaintiffs. Charging that the note of one thousand three hundred and four dollars and sixty cents, assigned to defendant Ward by plaintiffs was assigned by them in payment of their interest in the

stock of merchandise. Charging that plaintiffs and defendant Ward were partners at the time of the sale. Admitting that the price paid for the stock of goods was far below its actual value. Averring that such sale was procured by the plaintiffs and defendant Ward, by their connivance, to cheat and defraud respondent. Denying that the sale to his brothers on the 23d of November, 1893, was fraudulent, but the sale was made for valuable consideration, which was paid as shown in the deed. Alleging that the plaintiffs encouraged the sale and sanctioned the action and said that it was the right and proper thing for him to do. Denying that plaintiffs ever made any offer to compromise and settle as set out in the bill. Averring that the actions of the plaintiffs and Ira Ward had been guided by a spirit of avarice, and that they had been confederating and combining together for the ruin of respondent and his infant brothers, and that they had agreed among themselves that one of them "shall hold him while the other skins him," to use their own words and their own language. Praying that it may be ascertained whether or not a partnership exists between plaintiffs, or either of them, and defendant Ward, or existed at the time of the sale of said stock, and, if so, that he be decreed the difference between the selling price of the stock of merchandise and its true value, and that the difference be apportioned between them, and applied to his credit against their demands: that the trust deed to Dix and Kidd be released, and the vendor's lien of one thousand five hundred dollars on the one hundred and eleven and one-half acres of land be released, by the parties to whom they were made. And praying that, after ascertaining the affirmative matter therein prayed, he may have such full and adequate relief as may be adequate in the premises, and recover all his costs.

To this answer Chrislip Bros. and Ira Ward filed their special replications, and, in so far as it charged new matter and sought affirmative relief, denied each and every charge as to fraud on their part, and on the part of each of them, to cheat and wrong said Teter, and especially denying that there was between them, or either of them, and Ira Ward, any interest by partnership in the purchase by Ira Ward of the stock of goods from Teter, and denying

every charge in said answer, as if specially set forth, which fixes, or tends to fix, upon them, or either of them, any fraud, confederation, or combination to wrong John Teter or either of the infant brothers. And Ira Ward especially denying each and every charge of wrong on his part against John, Burton, or Lloyd: denying any fraud on his part in the purchase by him of said stock of merchandise from John Teter; denying that either of plaintiffs had any interest, direct or indirect, therein, or that any partnership existed between him and plaintiffs; especially denying that there was any fraud in retaining the vendor's lien of one thousand and five hundred dollars on the one hundred and eleven and one-half acres of land, or that said lien was against the knowledge or consent, or against the consent of John Teter. Ira Ward filed his answer, averring that on the 8th of November, 1894, plaintiffs assigned to him, for value, one of the notes for one thousand three hundred and four dollars and sixty cents, no part whereof had ever been paid. Then, concurring in the allegations of plaintiffs' bill in charges of fraud against John, Burton and Lloyd Teter, and particularly the averments therein charging fraudulent disposition of property of John Teter for the purpose of hindering, delaying, and defrauding the plaintiffs in the collection of their debts, and the debt assigned to him. Denying that the stock of goods he bought from John Teter for two thousand and three hundred dollars was worth five thousand dollars, but that he paid, in his opinion, all he could afford to pay for it, and its full value. And not only adopting the allegations of the bill, in so far as not inconsistent with his answer, but charging that the said fraudulent disposition of the property of John Teter was with notice to the said Burton and Lloyd, who concurred therein, and advised and abetted the said fraud, with intent to hinder, delay, *etc.* Charging that the execution of the deed of November 23d, by John Teter to his brothers was fraudulent, and that the brothers had notice of the fraud, and participated therein. And praying that it be set aside, as void as to the debt assigned to him; that he be decreed the debt; and for general relief.

The first assignment is that the court erred in overruling the demurrer to plaintiff's bill. Fraud is sufficiently alleged, with proper parties to the bill, to give jurisdic-

tion; hence the court did not err in overruling the demurrer.

The second assignment of appellants is that it was error for the court not to finally adjudicate the E. E. Tutt account, as between the parties to the suit. Appellees also claim that this is an error to their prejudice. 1 Pom. Eq. Jur. § 181, says that: "When a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of the matters at issue, for this reason: If the controversy contains any equitable features, or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies, which would otherwise be beyond the scope of its authority." In *Hanly v. Watterson*, 39 W. Va. 214 (19 S. E. 536): "When a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved, to avoid a multiplicity of suits."

Appellants' third assignment is that the court erred in decreeing that the deed of November 23, 1893, was fraudulent and void, and made with intent to hinder, delay, and defraud the creditors of appellants, and holding that the same was taken by Lloyd A. and Burton I. Teter and their guardian, Catherine Teter, with notice of such fraudulent intent. Appellees claim that it was error not to make a decree setting aside, as fraudulent and void as to their debt and the debt of the assignee, Ward, the said deed of November 23d of John Teter to his brothers. A large mass of testimony was taken touching the question of fraud in the sale and conveyance by John Teter to his infant brothers, Lloyd and Burton, as well as to the sale of the stock of goods by John Teter to Ward, and concerning all other transactions between plaintiffs and defendants John Teter and Ira Ward, and the fraudulent disposition of his personal property by John Teter with intent to hinder, delay, and defraud his creditors. I have carefully read and considered all the depositions taken in the case, and find a great conflict in the evidence. There can be little doubt,

if any, that if there was any fraud intended on the part of John Teter, the grantees and their guardian had knowledge of it. The note of Lloyd and Burton Teter for five thousand six hundred and twenty-five dollars and eighty-seven cents, was given for the deferred payment on the land, dated November 23, 1893, and not being due until December 1, 1894, yet the vendees, by October, 1894, had made payments on the note to John Teter, so that they owed less than one thousand four hundred dollars; the principal part of said payments being in cash, and they, too, having full knowledge of his indebtedness to plaintiffs. I am not inclined to disturb the opinion of the court in holding the conveyance of November 23, 1893, to be fraudulent and void as to plaintiffs' and Ward's debts, and am sustained in this by the ruling of this Court in *Smith v. Yoke*, 27 W. Va. 639: "Where the decree sought to be reversed is based upon depositions which are so conflicting, and of such a doubtful and unsatisfactory character, that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusion to be deduced therefrom, the Appellate Court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the Appellate Court might have pronounced a different decree if it had acted upon the cause in the first instance." On finding that the conveyance of November 23, 1893, was made by the said John Teter with intent to hinder, delay, and defraud his creditors, especially as to the plaintiffs' and defendant Ira Ward's debts, and of which fraud the defendants Burton I. and Lloyd A. Teter and their guardian had full notice before and at the time of said conveyance, and therefore said conveyance is fraudulent and void as to the plaintiffs and Ira Ward's debts herein decreed to them, the court should have set aside the said conveyance, as to said debts, and decreed the sale of said land to satisfy the same; there not being a sufficient amount of the purchase money still unpaid and due from said Lloyd and Burton to pay off said debts.

Appellants' fourth assignment of error is in decreeing the conveyance of the Roane county land to be fraudulent and void for the purpose of hindering, delaying, and defrauding appellants' creditors, and especially decreeing a

sale of said lands under the pleadings and proof in the cause. And appellees assign the same error as being to their prejudice "because there were no allegations in the bill filed by them in respect to the Roane county land acquired on the 21st of September, 1894, after the institution of their suit, and, having no lien thereon, they therefore acquired no lien, under section 2, chapter 74, of the Code, and they sought none by the institution of this suit and the filing of their bill." The Roane county land, or the conveyance thereof, is not mentioned, attacked or set up in any of the pleadings in this cause, and therefore can not be a subject matter for decree in the cause. *Coaldale M. & M. Co. v. Clark, etc.* 43 W. Va. 84 (27 S. E. 294); *Shoe Co. v. Haught*, 41 W. Va. 275 (23 S. E. 553); and *Roberts v. Coleman*, 37 W. Va. 143 (16 S. E. 482).

The fifth error assigned is that the court below refused to adjudicate and determine the rights of the parties alleged in the affirmative relief prayed for in the answer of John Teter to plaintiffs' bill. The court not having passed upon the questions arising upon the allegations contained in the answer of defendant John Teter in the nature of a cross bill, and praying for affirmative relief, there is nothing of which this Court can take jurisdiction touching this point, in advance of such action. The decree of the circuit court complained of must be reversed, and cause remanded for further proceedings to be had therein according to the principals therein laid down.

Reversed.

CHARLESTON.

CURRENCE v. WARD *et al.*

(DENT, JUDGE, *concurring.*)

Submitted February 2, 1897—Decided April 21, 1897.

1. EXPRESS TRUST—*Constructive Trust.*

Express and constructive trusts distinguished. (p. 369.)

43	367
43	556
43	754
43	367
45	249
43	367
46	254
43	367
47	66
47	67
47	315
47	550
43	367
48	686

43	367
55	555

43	367
56	645
57	379
57	483
57	484
57	488

43	367
60	376

43	367
62	560
63	76

43	367
d64	237

2. EXPRESS TRUST—*Judicial Sale—Equity.*

Where one before a judicial sale agrees to buy in the land in his name for the benefit of the debtor, the debtor to pay the purchase money, and keep the land, this is an express trust, enforceable in equity. A second sale under decree and purchase by same purchaser will not defeat the trust. (p. 371.)

3. EXPRESS TRUST—*Constructive Trust—Parol Evidence.*

Neither an express nor constructive trust in lands need be created, declared, or proven in writing in this State, but may be shown by oral evidence. (p. 370.)

4. EXECUTORY AGREEMENT—*Parol Agreement—Enforcement of Trust—Equity.*

Where one buys land under executory agreement, and afterwards, before legal title is passed, verbally agrees that if another will pay the purchase money he shall have the land, and that other does so, the trust is enforceable in equity. No agreement or payment, after legal title passed, will be valid without writing. (p. 370.)

5. CONSTRUCTIVE TRUST—*Resulting Trust—Title.*

Where one party pays all or part of the purchase money for land, and title is taken in the name of another, a constructive trust, called a "resulting trust," arises in favor of the party paying as to the whole land, or *pro tanto*. (p. 373.)

6. RESULTING TRUST—*Trust pro tanto.*

Where one pays part of the purchase price of land, and a deed is taken in another's name, so that a resulting trust arises, so it is certain what amount the one claiming under the trust paid, whether the part paid be an exact divisor of the whole or not—that is, whether it be an aliquot part or not—is immaterial, this will be a trust *pro tanto*. There must be certainty as to the interest in the land. (p. 374.)

7. TRUSTS—*Real Estate—Personal Property.*

A trust may exist in any property, real or personal, which is, in the eye of a court of equity, property of value. (p. 376.)

Appeal from Circuit Court, Randolph county.

Bill by Melvin Currence against Wirt C. Ward and others. Decree for plaintiff, and defendants appeal.

Affirmed.

A. M. POUNDSTONE, L. D. STRADER, W. T. ICE and BROWN JACKSON & KNIGHT, for appellants.

BUTCHER & HARDING, DAYTON & DAYTON and A. C. SNYDER, for appellee.

BRANNON, JUDGE:

Under decree of the Circuit Court of Randolph county certain land of Melvin Currence was sold, and purchased by William L. Ward and Wirt C. Ward, and afterwards, under decree of resale for non-payment of purchase money, the land was again sold, and purchased by the same purchasers. The sales were confirmed. Before all the purchase money had been paid, or a deed made conveying the land to the purchasers, Currence instituted the present suit against the said purchasers and Lewis C. Conrad, to whom they had sold the land, alleging that the Wards had purchased in the land for his benefit, and that Conrad purchased with notice of his rights, and seeking to have it decreed that said purchase by the Wards was in trust for his benefit, and to set aside the sale by the Wards to Conrad; and the decree gave Currence the relief he asked, and the executor of William L. Ward appealed.

There is some question, under the arguments in this case, as to what kind of a trust is alleged to exist in this case. The subject of trusts under equity jurisprudence is a very complicated and difficult one, the fountain of inexhaustible litigation. The books on trusts in their definitions are, necessarily perhaps, variant and confused. I think that for simplicity's sake we should divide trusts into two classes, calling one direct or express trusts (that is, trusts springing from the agreement of the parties), and the other constructive or implied trusts (that is, trusts created by equity law). Under the latter subdivision will fall all trusts, that are called implied trusts, constructive trusts, trusts arising from fraud or otherwise; in short, all trusts that do not spring from the agreement of the parties. Underh. Trusts, p. 10; Rice, Real Prop. p. 595 and 2 Pom. Eq. Jur. p. 1447,—so classify trusts. Underhill says: "A declared or express trust means a trust created by words, either expressly or impliedly evincing an intention to create a trust;" and that "a constructive trust means a trust not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice." See 27 Am. & Eng. Enc. Law, 3; Hill, Trustees, 55; 1 Perry Trusts, § 73. Though this is an express trust, no writing to create it or to evidence it is necessary, because

the seventh section of the English statute of frauds, requiring all declarations or creations of trust to be manifested and proved by writing, though re-enacted in many of the American states, is not included in our statute of frauds. It is well settled that before that statute in England such a trust in lands could be created without a writing, and, of course, it can be so here now. Parol declarations or creations of trust in realty must amount to clear and explicit declarations of trust; loose and indefinite expressions will not do. Hill, Trustees, 59. Such a trust must be created before the trustee obtains legal title, for, if the agreement be subsequent, it would fall under the provisions of the statute of frauds requiring the transfer or sale of lands to be in writing. 1 Perry, Trusts, §§ 77, 140; *Smith v. Turley*, 32 W. Va. 14 (9 S. E. 46). I think the evidence, which I will not detail, establishes the fact that prior to the first sale under decree, the purchasers and Currence had an agreement and understanding by which the said purchasers were to buy in the land in their names for the benefit of Currence, and that upon his payment of the purchase money the land was to be his. This surely created a direct or express trust. 1 Perry, Trusts, § 171, *Nease v. Capehart*, 8 W. Va. 95, fully discusses and fully sustains this. See, also *Walraven v. Lock*, 2 Pat. & H. 547; *Borst v. Nalle*, 28 Grat. 423. This being so, it seems to me the right of Currence to relief is plain.

Under the agreement between him and the Wards, he paid the cash payment under the first sale, and from time to time he made different payments, amounting to one thousand three hundred and five dollars and seventy cents, leaving yet unpaid a considerable balance under the judicial sale. There is no principle of equity which shall debar him if he pays the balance of the purchase money, and exonerates the Wards from their obligations touching it, from having this land conveyed to him. It must not be thought that the fact that the land was sold a second time will make any difference. Currence's failure to pay the money is a common misfortune oftener than it is a fault of debtors under distress, and should not work, and in equity will not work, a forfeiture of his rights. Courts of equity do not look with favor upon any kind of forfeiture losing parties substantial rights

justly vested in them. All that the Wards can claim in a court of equity is that they be left perfectly unharmed from the obligations, which as purchasers, they assumed in this case. Being made whole, what further equity have they? They will have lost nothing, from a money point of view, though this act of their friendship may have cost them some personal anxiety, vexation, and trouble. If, before this second sale, the Wards had distinctly notified Currence that he was in default, that their friendship had gone as far as they intended it to go, that he must look out for his own interest, and that they would at the second sale purchase on their own account free from any further trust, that second sale might have (I do not say that it would have) destroyed the trust, and exonerated them from further obligation under it. But they did not do so. They simply became purchasers again, and the same relation of trust continued after that second sale. As is said in the opinion by JUDGE SPYDER in *Murry v. Sell*, 23 W. Va. 475: "When the relation of trustee and *cestui que trust* is once established, no subsequent dealing with the trust property by the trustees can relieve it of the trust as between him and his *cestui que trust*, is too well established to require argument. *Vangilder v. Hoffman*, 22 W. Va. 1; *Lawrence v. Du Bois*, 16 W. Va. 443." Therefore the subsequent sale of the land for the purchase money due from Hull, and the repurchase by Ward at such sale, did not divest or affect the equitable title of the plaintiff to one-half the land. Upon said repurchase Ward held the legal title as trustee for one-half the land just as he did under the first purchase. The books sustain this proposition. Hill, Trustees, 60.

It is said that after this second sale Currence surrendered to the Wards possession of the land, and that this ought to debar him from relief. But I do not think so. It was under the certainty of expulsion by a writ of possession. It is also said that his payment of rent to the Wards, which seems to be not a fixed rent, but some grain from the mill, is another circumstance to debar Currence from relief. Perhaps I ought not to say that it is presented as a bar; it is not a bar. These are circumstances, it is true, against Currence, but only evidential in character, tending to deny the existence of any trust agreement, but they do

not operate as forfeiture or release or abandonment of the lawful rights of Currence if the trust be once clearly established, for when once a trust is clearly established a court of equity looks at the substance, will not defeat it upon light and trivial grounds, but will accord to each party his just and lawful right, preserving them according to the original contemplation of the parties. When once a trust is established, it continues to be a trust unless it is intentionally released, or is defeated by laches. 27 Am. & Eng. Enc. Law, 310, 321. If this second sale were even procured by the Wards with intent to defeat Currence's rights, it would not, nor would their sale to Conrad, defeat the trust in favor of Currence, for the acts of the settlor or trustee cannot defeat the trust. It requires the full consent of all the parties to defeat it. 1 Perry, Trusts, § 104; *Heiskell v. Powell*, 23 W. Va. 717. One who buys at a judicial sale under oral agreement for the benefit of another will be held trustee. *Denton v. McKenzie*, 1 Am. Dec. 664; *Miller v. Antle*, 92 Am. Dec. 495. The fact that it is a judicial sale makes no difference. *Beegle v. Wentz*, 93 Am. Dec. 762. Under the head of an express trust I consider Currence entitled to relief.

But suppose there were no such agreement at the time of the first sale creating such express trust. It is conceded by the Wards that after the sale they did tell Currence that if he would pay the purchase money on the land he should have his land back. He did proceed to pay considerable amounts of money in execution of this agreement. What is the law under this head? It might occur to any one that, as the equitable right had vested under the sale in the Wards, this arrangement between them and Currence was nothing but a sale of the land, and, not being in writing, void, under the statute of frauds and perjuries; but that idea is untenable under three cases in this Court. *Murry v. Sell*, 23 W. Va. 475; *Heiskell v. Powell*, Id. 717; *Settler v. Mohn*, 37 W. Va. 507 (16 S. E. 496). In the *Murry-Sell Case*, it is laid down that if A. entered into an executory contract for the purchase of land, and afterwards, before the title is conveyed to him, or any part of the purchase money is paid, he agrees with B., a stranger, that if he will pay half the purchase money he shall be an equal owner, and they both pay equally, and the legal

title is subsequently conveyed to A., there is a resulting trust in favor of B.; and that this trust is exempt from the statute of frauds, and it is competent for the real owner to prove payment of the purchase money by oral evidence. Such a trust as this, commonly called a "resulting trust," was exempt from the statute of frauds expressly by the English act, and never was under that act, and our act is not affected by it. I thought at first that this was questionable on the principle stated in *Smith v. Turley*, 32 W. Va. 14 (9 S. E. 46), that the resulting trust must arise at the time the title is taken, and no subsequent oral agreement or payment will create it, as under our present view this agreement took place after the sale and the birth of the rights of the purchasers; but the title thus acquired was only an equitable title, and the legal title had not been conveyed to the purchasers at the date of this agreement, and I find from the books that, if the arrangement be made before the legal title vests in the alleged trustee, it becomes an enforceable trust. Perry, Trusts, § 133. So, under this head, it is nothing but an ordinary case of purchase in the name of one man, and the purchase money paid by another; and the rule is well settled that there arises a resulting trust in behalf of him who pays the money. *Pumphrey v. Brown*, 5 W. Va. 107; *Hamilton v. Steele*, 22 W. Va. 348. He is the owner of the land. Nor is it necessary that he pay the whole purchase money under that arrangement. If he pay part, and fails to pay the residue, or becomes unable to do so, the mercy of a court of equity will not allow his right to utterly perish, but, after shielding the trustee from loss by requiring the property to first indemnify him against any balance of purchase money binding him, will give the residue to the party making partial payment. He is a beneficiary *pro tanto*; that is, to the extent of his payment of purchase money. *Seiler v. Mohn*, 37 W. Va. 507 (16 S. E. 496); opinion in *Murry v. Sell*, 23 W. Va. 480; 1 Perry, Trusts, §§ 126, 132.

Observing in the books expressions to the effect that to raise a resulting trust the money paid by the one claiming it must be an aliquot part of the whole, and Currence not having paid an aliquot part, it occurred to me that this might be an obstacle to relief, but an examination has sat-

ified me to the contrary. So it be clear what amount is paid, it would seem to be immaterial whether it be an aliquot part of the whole. Forty-nine is just as well a certain fraction of one hundred as is fifty. This theory likely originated in a statement by Lord Hardwicke in *Crop v. Norton*, 9 Mod. 233. He likely referred, not to payment of part of the purchase money, but to where several paid, intimating that there could be no resulting trust in favor of two or more paying, but only where one was the beneficiary. This even is not a tenable view, because in the later case of *Wray v. Steele*, 2 Ves. & B. 388, it was held that there could be a resulting trust in favor of several. This is now established. *Hill, Trustees*, 92, 93; *1 Perry, Trusts*, § 132. As to Lord Hardwicke's statement, Chancellor Kent said it was not correct when only a single individual claimed the benefit, for the cases recognized the trust where the money of A. formed only a part of the consideration for the land purchased in the name of B. The land in such case is to be charged *pro tanto*. That is the case of *Botsford v. Burr*, 2 Johns, Ch. 405. Judge Story adopts the principle of the later cases. *Powell v. Manufacturing Co.*, 3 Mason, 347, Fed. Cas. No. 11,356. Some of the cases cited to sustain this proposition do not. *Baker v. Vining*, 50 Am. Dec. 617, only holds, like our case of *Shaffer v. Fetty*, 30 W. Va. 248 (4 S. E. 278), that it must appear what amount the party claiming the trust paid, and that, where that was uncertain, no trust would be raised. *Fleming v. McHale*, 47 Ill. 282, cited for the proposition, is flatly against it, holding that, where the first payment is in full of one installment of purchase money under the contract, as in the present case, the rule of aliquot payment is complied with, whether the part paid is an exact divisor of the whole purchase price or not. *McGowan v. McGowan*, 74 Am. Dec. 668, has no bearing on part payment of purchase money, but holds that the payment must be made for a distinct part or interest in the land. The books are indefinite as to this aliquot part expression; sometimes referring to a definite part of the land, sometimes of the money. See full note to *Neill v. Keese*, 51 Am. Dec. 753. Though the theory on which a resulting trust rests is that the payment made becomes converted into land, and is not a lien on it, that refers rather to the time of payment (that is, that it

must be before the legal title is taken), rather than to the portion of the money paid, or of the interest in the land springing therefrom; for where both have paid they can have joint interest in the land proportionately to the money paid (that is, the party who is to hold as trustee and the beneficiary), just as where there are two or three beneficiaries paying separate amounts. So if one pay forty-nine dollars and another fifty-one dollars, their interests would be 49-100 and 51-100 respectively, just as reasonably as if each had paid fifty dollars. It is only necessary that it be clearly shown what part he has paid (*Shaffer v. Petty*, *supra*; Hill, Trustees, 92, note 2; 1 Perry, Trusts, § 132); but there must be certainty as to the interest in the land.

Counsel for appellants suggest that, as the title and disbursement of the proceeds are under the control of the court in the creditors' suits in which the land was originally sold, Currence should not bring an independent suit, but go into that to have his relief. Obviously that would be the introduction into that suit of matter wholly foreign to it. Though no title but an equitable one has yet passed to the purchasers under the sale, yet they had made a sale to Conrad, and Currence had right, as they denied his rights, to sue to have his rights adjudged and declared, and to vacate the sale made to Conrad. If he, after such adjudication in favor of his rights, should pay the purchase money, he would be entitled to the land, and the court vested with the title would, upon a proper showing by him, confer title upon him. He is not compelled, under these circumstances, to wait until a deed shall have been made. He had the right to ask a judicial sentence binding upon those claiming adverse interests to him. It may be thought that, as no deed has been made, but title is in abeyance in the hands of the court, no trust has arisen as yet; but note that the right to have the title in the power of the court passed is dependent upon who has that equitable title arising under the sale. On the face of the papers the Wards are possessed of it, and the court will pass the legal title to them. The question arises, who is entitled to go before the court and have title passed,—the Wards or Currence? Or, after its conveyance to the Wards, whether Currence is the real owner. The right to the legal title depends upon the question whether the Wards or Currence are en-

titled to it. That equitable title is a sufficient title in the eyes of a court of equity to be the subject of a trust, sufficient to enable a court of equity to declare the right as to it; for there can be a trust under a legal or an equitable estate in anything which a court of equity recognizes as a subject of property. 27 Am. & Eng. Enc. Law, 24; Underh. Trustees, 9, note; 1 Perry, Trusts, §§ 67, 96. If A. buy an executory title with B.'s money, cannot B. sue A. and the vendor before deed made to declare the trust and have the title made to him?

The evidence is conflicting in this case as to whether Conrad, before his purchase, had notice of Currence's rights. Currence swears positively that he gave him notice; Conrad just the reverse. There is some evidence corroborating Currence. The court probably found for Currence on this issue of fact, but, no matter whether it did or not, the legal title had not passed. Conrad had not paid all of his purchase money and obtained his deed. This suit itself was a notice to him of Currence's claim. He is not, therefore, a complete purchaser for valuable consideration. The first sale was on the 11th of January, 1886; the second sale on the 14th of September, 1887. This suit was brought in December, 1888. While it is true, as laid down in *Smith v. Turley*, 32 W. Va. 14 (9 S. E. 46), that long lapse of time will defeat the enforcement of such a trust, this short delay would not do so. Being purely cognizable in a court of equity, the statute of limitations has no reference to it. *Heiskell v. Powell*, 23 W. Va. 718.

We are asked to open up the matter of rental found by the commissioner against the Wards for the property while in their possession. We see no reason for so doing in this Court. Under the present statute they may except to the commissioner's report by leave of the circuit court, or show cause for a recommitment of that question to a commissioner. The court will have discretion, upon proper cause shown, to allow further hearing before the commissioner of that question.

One of the briefs of counsel in this case would treat this case on the theory that the Wards were but sureties of Currence in this transaction, and that when they bought the second time they could and did buy free from any obligation to Currence, on the theory that sureties may buy to

protect themselves. But this is not the real cast of the case. The Wards were simply purchasers under a trust, and the transaction can be treated only in that light,—the light in which it is well defined in equity jurisprudence. Relief must be given or refused upon that basis, as that is the condition in which the parties place themselves.

One of the counsel in this case has argued that the demurrer ought to have been sustained, because of the want of certainty in the bill, treating it as a bill to enforce a constructive or resulting trust only; claiming that for that purpose the bill is uncertain and indefinite. It is useless to enlarge upon this subject. The bill sets up enough to make an express and also a constructive trust, and is good. I rest the case on the basis of trust, not on fraud. Not every refusal to pay or live up to a contract is fraud to give jurisdiction in equity. There must be fraud in the inception—in the procurement—of the contract. I do not think the position assumed as one point in brief of counsel that the agreement would be good treated as a verbal contract under the doctrine of part performance will hold good. Treating it simply as a sale, no possession was taken under it. Currence simply remained in possession under his old right, but did not enter under the new. Affirmed.

DENT, JUDGE: (*concurring*).

JUDGE BRANNON and myself have arrived at the same conclusion in this case, but on different grounds; he holding that the agreement between the Wards and Currence created an express trust, enforceable in a court of equity, while I place it on the jurisdiction of equity to prevent the consummation of attempted fraud; both, in the end, however, amounting to the same thing, simply depending on a different mode of reasoning; my position being that the Wards had not as yet acquired any vested trusteeship, and the only thing they did have was that by the trust and confidence reposed in them by Currence they were in position to take undue advantage of him, and thus perpetrate a fraud upon him by acquiring and disposing of the legal title to his property. They had neither the equitable nor legal title, nor even the mere right to demand a conveyance of the same without being guilty of a breach of confidence; yet they were in a position to do so. The mere

fact that a person is in a condition to create a trust in himself would hardly elevate him to the position of trustee, although his advantageous position, being one acquired by trust and confidence, would justify the interference of a court of equity to prevent the consummation of threatened wrong. Courts of equity prevent the perpetration of, as well as relieve against, consummated frauds. As defined by Story: "Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, or are injurious to another, or by which an undue advantage is taken of another." Story, Eq. Jur. § 187. Currence, while holding the equitable title, not having fully paid the purchase money, was not in position to demand the legal title then in abeyance by the decree of confirmation, and, if the Wards had remained quiescent, would have had no right to apply to a court of equity for relief; but when the Wards, acting in breach of the confidence reposed in them, took the possession of the property away from him, and made an attempted sale thereof to Conrad, they were guilty of fraud in the sense of a court of equity; and whatever rights, little or great, they acquired by their unconscientious conduct, they must be deemed to hold as trustees for Currence as to any vested rights, and the same may be said of their vendee, who, with eyes open, purchased their interests. 1 Perry, Trusts, § 169. This trust, however, arising from breach of confidence is constructive and not express. Although it is true that an express trust would arise by the agreement had between Wards and Currence prior to the sale, yet Currence, not having paid the purchase money, nor now showing himself in condition to pay, is not entitled to enforce such trust, and the court acquires no jurisdiction by reason thereof, but the jurisdiction is from the fraudulent conduct of the Wards in assuming the rights of absolute owners of the property in violation of their agreement. In the case of *Mulholland v. Yark*, 82 N. C. 513, the supreme court of North Carolina, in commenting on a parol arrangement by which an attorney for a debtor was to buy the debtor's land at an execution sale, and hold the same for the debtor's benefit, and reconvey on being reimbursed, says: "In our opinion, a trust may be thus formed,

and it will be enforced on the ground of fraud in the purchaser in obtaining the property of another under a promise to allow him to redeem, and attempting afterwards to appropriate it to his own use." In *Turner v. King*, 2 Ired. Eq. 132,—a case in which the defendant verbally agreed with the plaintiff to buy in his lands about to be sold under execution, and allow him to redeem on repayment of the purchase money, and this being known to the bidders, two of them desisted, and the defendant bought for one hundred and ninety dollars lands worth four hundred and fifty dollars,—Daniel, J., for the court, says: "The attempt of the defendant to set up an irredeemable title after the agreement he entered into is such a fraud as this court will relieve against." In *Vannoy v. Martin*, 6 Ired. Eq. 169,—a similar case to the foregoing,—the court said: "It would be a gross fraud upon the plaintiff if the said defendant were permitted to set up an absolute title to the land, which it is the duty of a court of equity to prevent, and in the way of preventing which the act making void parol contracts for the sale of land does not stand." The court, in the case of *Mulholland v. York*, cited, in commenting on these and other like cases, says: "These adjudications proceed upon the assumption that the debtor, trusting to the good faith of the party promising, and lulled into a false security, may have desisted, in consequence of the assurance, from making other efforts to prevent the sale and sacrifice of his property; and it would be a fraud in the purchaser to take advantage of the confidence, and hold it thus acquired for his own use, and to the injury of the owner." All similar cases that I find base equity jurisdiction on the grounds of fraud, and, as a resultant thereof, hold the attempted perpetrator a mere trustee for the benefit of his unwary and confiding victim as to any tangible rights acquired. *Troll v. Carter*, 15 W. Va. 567; 1 Perry, Trusts, § 171.

Appellants' counsel object seriously to the word "fraud" as applied to the attempt of the Wards to get the lands in controversy at about one-half their true value, and prefer, if relief be granted the appellee, Currence, it be under the head of "trust," the term being less opprobrious, as quinine is less bitter in capsules or sugar-coated tablets. To this I have no objection, the result being the

same, and therefore allow the opinion prepared by my associate to be substituted for my former opinion, with the reservation that it is a distinction without a difference, and that fraud, in the sense of a court of equity, is fraud, it matters not under what language it may be concealed.

Affirmed.

CHARLESTON.

JACKSON v. NORFOLK & W. R. Co.

(DENT, JUDGE, *dissenting.*)

Submitted January 25, 1897—Decided April 21, 1897.

1. MASTER AND SERVANT—*Fellow Servants—Master's Liability.*

The test whether a master is liable to one servant for the negligence of another servant is the character of a negligent act. If it be in the doing of an act incumbent on the master as a duty of the master to the servant, the master is liable; otherwise not. (p. 382.)

2. MASTER AND SERVANT—*Fellow Servants—Master's Liability.*

A master's liability to one servant for the negligence of another is not dependent on the grade of the servants, nor on the fact that one has authority over the other, but on the character of the negligent act. (p. 384.)

3. RAILROADS—*Trainmen—Fellow Servants—Vice Principal.*

A conductor is a fellow servant with a brakeman and other servants on a train, not a vice principal: (p. 392.)

4. MASTER AND SERVANT—*Fellow Servants—Negligence.*

All servants engaged in the common service of the same master in conducting and carrying on the same general business, in which the usual instrumentalities are employed, are fellow servants. A proper test of this rule is whether the negligence of the one is likely to occur and inflict injury on the other. (p. 393.)

5. MASTER AND SERVANT—*Master's Liability—Fellow Servants—Negligence.*

If a vice principal, in the particular act in which his negligence occurs, is not in the line of his duty, but performing an act in the line of one who would be a fellow servant with the injured servant, the master is not liable for the negligence of the vice principal, as he is, as to this act, a fellow servant with the injured one. (p. 397.)

Error to Circuit Court, Mercer county.

Action by Murray T. Jackson against the Norfolk and Western Railroad Company. Judgment for plaintiff, and defendant brings error.

Reversed.

A. W. REYNOLDS and JOHNSON & HALE, for plaintiff in error.

DOUGLASS & McNUTT, for defendant.

BRANNON, JUDGE:

Jackson was a brakeman in the service of the Norfolk & Western Railroad Company, and was on a freight train with Gilbert as conductor. A train was being backed so as to couple it to some cars. Gilbert was standing on top of the rear car of the train that was backing, and an unsuccessful effort was made to couple the cars, and the train was drawn forward preparatory to a second attempt, and Gilbert waved the engineer to back up the car; and Jackson, seeing this, attempted to jump back, and in so doing his arm was caught between the bumpers and crushed, rendering its amputation necessary. Jackson sued the company, recovered judgment, and it sued out this writ of error. The case involves the question whether Gilbert, the conductor, and Jackson, the brakeman, were fellow servants, so as to exempt the company from liability for the alleged negligent act of the conductor in improperly calling the train back when he did.

The defendant's counsel have filed briefs, very lucid and able, in which they ask us to review this subject of fellow-servantcy (to coin a word to express the idea in one word). By "fellow-servantcy" we mean that where there are two servants or employes of a common master or employer, and one of them, from the negligent act of the other, receives injury, the master is not liable for the same, because, when a servant enters the service of a master, he assumes and runs the risks and dangers incident to the service, and it is unreasonable that he should call on the master to make good to him all damages that may befall him from the acts of any and of all fellow servants in the employ of the master. This doctrine originated in South Carolina in 1841, and was followed in Massachusetts in

1842, and was first held in England in 1850. *Murray v. Railroad Co.* (S. C.) 36 Am. Dec. 268, and full note. The process of the evolution of this doctrine of fellow-servantcy has been a remarkable one, in the fact that it has engendered a discussion in all the courts of the land on frequent occasions, and has caused a woeful conflict of authority in innumerable cases; and he who undertakes to examine it will be wearied in mind, and almost hopeless of extracting from text-books and decisions any certain, definite rule upon the subject. The difficult question is, who are fellow servants? Necessity calls for some test or rule generally applicable in the multitudinous cases everywhere; and a principle of justice here presents itself, furnishing that rule,—putting on the master liability when he should bear it, and leaving with the servant misfortune when he should bear it. That principle logically says that we must look at the act negligently done, causing the injury, and, if the performance of that act is a duty which the master is required by law to do properly, then he is liable, whether he negligently do the act himself, or through another as his servant; but if it is not an act of duty imposed by law upon the master, but one purely the duty of another servant to do properly, both for the benefit of his master and of his fellow servant, the master is not liable. I repeat that it depends on the character of the act negligently done. Is it a duty of the master to the servant? We must therefore see what duties the master owes to the servant. These duties are well summed up according to the received law in *Madden v. Railroad Co.*, 28 W. Va. 617, as follows: “FIRST. To provide safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and making proper inspections and tests. Second. To exercise like care in providing and retaining sufficient and suitable servants for the business. Third. To establish proper rules and regulations for the service, and, having adopted such, to conform to them. All the foregoing duties, it will be observed, are included in the one general duty of the master to provide a safe plant. The law is well settled that the master is not required to be a guarantor or insurer in this behalf, but is only required to

employ reasonable and ordinary care in selecting what he requires, and is necessary for his business." I will add that he must furnish a safe place in which his servant is to work.

The doing of these things is a duty of the master to the servant for the latter's safety. The master can either perform these duties personally, or he may delegate their performance to some one else, whom the books call "vice principal," because he stands, as to these duties, in the place of his master; but if either fails in the performance of duty in any of these respects, and damage results to a servant, the master must answer. If, however, the damaging negligent act is not one of the things which rest on the master as a duty to the servant, it is the act purely of a fellow servant, and the injured servant must look to him, not to the master. These duties falling on the master to perform are called in the law books "non-assignable duties," because he owes them to the servant, and he can not assign them to another to perform, and exempt himself from liability for their misperformance. These duties are sometimes spoken of as duties in construction, preparation, and preservation, as contrasted with mere work of operation. For instance, the construction of the railroad or other work, the preparation of machinery and implements to be used in the business, the preservation of the track or working place, or machinery and appliances, in proper, safe condition, and the selection of proper servants to work. The master having well done his duty in these things, their handling and use in the prosecution of the work designed is a work of mere operation, and this work the servants must perform well, in the interest of their master and fellow servants; and if one fails to do so, and injures a fellow servant, the master is not liable, since he can not always stand by and watch the servant in his every act in the carrying on or operation of the business, and the law, of necessity, permits him to commit this work of mere operation to other hands. To illustrate: The employer must furnish a good wagon, railroad car or brake, or mowing machine, and failing herein, to the injury of his employe using them in ignorance of deficiency, he must repair the injury; but, having them, if one servant by their careless use injure a fellow servant, the master is not to

repair his injury. For the misuse of these things by a servant the master would be liable to strangers, but not to another servant, because when he entered upon the service he assumed the risks and dangers that might occur in the business,—among them, the danger that he may receive injuries from the negligence of a fellow servant. It would be unjust to make the master an insurer of every servant against the negligence of every act of other servants, in many instances numbering thousands, working over hundreds of miles, or a wide area of territory, the master necessarily himself absent. What man or corporation engaged in any business could endure such danger and burden? It would be a crying injustice to the farmer, merchant, coal operator, railroad or steamboat company,—to all business operators. The law is severe enough, in holding employers responsible for good track, machinery, *etc.*, as above stated, without making them guarantors for the acts of every servant. You can not make the master liable for an act of mere operation, no matter by what servant done. You cannot exempt him for an act not one of mere operation, but of his personal duty, though done by any servant. If he does the act in person, he is liable, regardless of the character of the act. Whart. Neg. § 205; Beach, Contrib. Neg. §§ 302, 303.

This is the rule of reason and justice. It is supported by the great volume of authority in text writers and decisions. But another rule has been followed to a very considerable extent, known as the "rule of superior servants; that is, where the negligent servant in grade of employment is superior to the injured one, or where one servant is placed by the master in a position of subordination, and subject to the orders and control of another in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master as his *alter ego* or vice principal, and the inferior servant is injured by the negligence of the superior servant, the master is liable. This rule, as McKinney, Fel. Serv. § 43, says, has produced endless confusion, and is favored by many text writers, and adopted by the Southern and Western courts, and by the United States Supreme Court; but, on the other hand, the entire doctrine of the liability of the master for a superior servant's tort to an inferior is repu-

diated by courts whose number and authority outweigh those favoring the doctrine. But, since Mr. McKinney wrote, that rule has been overthrown by a change in the Supreme Court of the United States, whose decisions in the case of *Railway Co. v. Ross*, 112 U. S. 377 (5 Sup. Ct. 184), has been the parent of much erroneous decision upon this subject. That case held that a conductor was a vice principal, standing in the shoes of the master, because given authority and control over his train, and of other employes on it, to direct and order them, and was thus a superior servant, clothed with the authority of the master, and that his negligent act, injuring other servants, rendered the master liable, because he was a superior fellow servant. This doctrine did not render the question of the master's liability or nonliability dependent on the true principle (that is, an inquiry whether the act performed by the conductor was one of duty to other servants, or one of mere conduct or operation of the business), but from the simple fact that he controlled the train, and could direct and order other servants, made the master liable, although it is plain that that conductor did only his part in the mere management and operation of the train, along with brakemen and other trainmen. It made the grade or control of the conductor, because in some respects superior, the controlling element. Mr. Bailey, in his work on *Master's Liability for Injury to Servant* (page 239), says that in the *Ross Case* a wide departure from the true principle was made, and that perhaps no decision of that court created greater surprise in the profession; that its influence had been wide,—many states, after years of uncertainty adopting its rule as the correct solution of a vexed problem,—and that it was prophesied by many jurists and lawyers that this doctrine would be temporary and of short duration; that it was rendered by a divided court (five to four), and the reasoning of the court not satisfactory. That prophecy of its short duration was not long in being realized. In *Railroad Co. v. Baugh*, 149 U. S. 368 (13 Sup. Ct. 914), it was virtually repudiated, being limited to the particular facts of the *Ross Case*, and held not a rule of general application. The court said that: "So far as the matter of the master's exemption from liability depends upon whether the negligence is one of the

ordinary risks of employment, and thus assumed by the employe, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully, this: There must be some personal wrong on the part of the master,—some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible." The court quotes with approval the opinion of the supreme court of Kansas, as furnishing the true rule: "A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and, when the master has properly discharged these duties, then, at common-law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employees. And at common-law, whenever the master delegates to any officer, servant, agent, or employe, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employe, stands in the place of the master, and becomes a substitute for the master, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common-law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow servant or co-employe of such servant, where the fellow servant or co-employe does not sustain this representative relation to the master." The court said: "*Prima facie*, all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarkation than

that of control must exist, to destroy the relation of fellow servants."

In the later case of *Railroad Co. v. Hamby*, 154 U. S. 349 (14 Sup. Ct. 983), a day laborer of the company, working on a section force, was held a fellow servant of an engineer and conductor of a passenger train, and it was held that that laborer could not make the company liable for the negligence of the engineer or conductor. Justice Brown there shows that, as between laborers upon a railroad track, and the conductor or other employes of a moving train, the courts of most of the states regard them as fellow servants, but in some otherwise. This case is contrary to the *Ross Case*, and overrules it. In the later case of *Railroad Co. v. Keegan*, 160 U. S. 259, (16 Sup. Ct. 269), it was held that one of a force of men in the service of a railroad company, employed in coupling and uncoupling cars under the orders of one of them, receiving an injury from the negligence of the boss, could not hold the company liable, because the boss and he were fellow servants. The court repeats the rule that the rightful test is whether "the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair, reasonable precautions to surround his employes with fit and careful co-workers, and furnishing a reasonably safe place to work, and reasonably safe tools and machinery, thus making the question of liability of an employer for an injury to his employe turn rather on the character of the alleged negligent act, than on the relations of the employes to each other, so that, if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master, but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor." And in the still later case of *Railroad Co. v. Peterson*, 162 U. S. 346, (16 Sup. Ct. 843), the court carefully and pointedly reviews this subject, and lays down the doctrine that a foreman of a gang of laborers, having in charge the superintendence of the gang in working, with power to hire and discharge hands, and exclusive charge of their direction and management in their employment, is a fellow servant, in fact and law, with others of the gang, and that the company is not

liable for an injury received by one of them from the negligence of the foreman, because of their fellow-servantcy. The court went on to define the duties of a railroad company, as master, towards its employes, and says that: "The general rule is that those entering into the service of a common master become thereby engaged in a common service, and are fellow servants, and *prima facie* the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to protect such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery, and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employes, and, if the employes suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which in such case is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such. In addition to the liability of the master for his neglect to perform these duties, there has been laid upon him by some courts a further liability for the neglect of one of his servants in charge of a separate department or branch of business, whereby another of his employes has been injured, even though the neglect was not of that character which the master owed, in his capacity as master, to the servant who was injured. In such case it has been held that the neglect of the superior officer or agent of the master was the

neglect of the master, and was not that of the co-employee, and hence that the servant, who was a subordinate in the department of the officer, could recover against the common master for the injuries sustained by him under such circumstances." The syllabus in that case says: "The previous cases in this court on this subject, examined, are found to determine the following points as to the liability of a railroad company for injuries to an employee alleged to have been caused by the negligence of another employee while the injured person was in the performance of his ordinary duties: (1) That the mere superiority of the negligent employee in position, and in the power to give orders to subordinates, is not a ground for such liability. (2) That, in order to form an exception to the general law of nonliability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not of a mere separate piece of work in one of the branches of service in a department. (3) That when the business of the master is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the persons placed by the master in charge of these separate branches and departments, and given control therein, may be considered, with reference to employees under them, vice principals and representatives of the master, as fully as if the entire business of the master were placed by him under one superintendent." On these principles, in the case of *Railroad Co. v. Charles*, 162 U. S. 356, (16 Sup. Ct. 848), it was held that a laborer in a gang riding in a hand car over the road to inspect the road, injured by a collision with a freight train, could not recover from the company for negligence of its servants on the freight train to give signals of its approach, because those servants were fellow servants; nor could he recover for negligence of the foreman in running the hand car at too high a rate of speed, because he, too, was a fellow servant with the injured party. Thus, the supreme court has recalled its departure from the true rule, and now leads in the announcement of the true rule in these repeated latest decisions. That the *Ross Case* was overruled in the *Baugh Case* is admitted in the *Baugh Case*, in the dissenting opinion of Justice Field, who wrote the opinion in the *Ross Case*. It must

not be supposed that the supreme court in these cases was acting on the legal decisions in the states from which the cases came; for in the *Baugh Case* it is expressly ruled that it was a question of general, not local, law, and the principles enunciated were those of general, and not local, law.

After completing, but before delivery of, this opinion, I discover that on the 15th of February, 1897, the United States Supreme Court, in *Oakes v. Mase*, 17 Sup. Ct. 345, held that "an engineer on one train is a fellow servant with a conductor on another on same road"; citing the four cases I cite above, thus adhering to their doctrine. Only one judge dissented. I believe this doctrine, as an original proposition, correct. However, if the highest court in the land, upon this question, arising not in one state, but daily in every state, had not changed its rulings, as our former cases followed it, I should not favor a departure from those cases. But how can we stand out against that court in its latest position upon a question in which there ought to be uniformity of decision, approved as it is by the most numerous and best text writers? The federal courts in this State will follow it as they are doing elsewhere. *Railroad Co. v. Brown*, 20 C. C. A. 147, (73 Fed. 970); *Balch v. Hass*, 20 C. C. A. 151, (73 Fed. 974), both C. A. cases. Why, in the same state, shall we have clashing rulings on exactly the same subject? I have just met with the opinion by Judge Goff in the Virginia case of *Thom v. Pittard*, 8 U. S. App. 597 (10 C. C. A. 352), and (62 Fed. 232,) holding that a foreman engaged on a work train in hauling materials for repair of road, who acted as conductor, and was foreman of the gang of laborers under him, and a section master having men under him, employed in keeping the roadbed and track in order, and who used for that purpose a portion of the load on the work train, were fellow servants with the laborers under them. I refer to Judge Goff's opinion, as harmonizing in substance and spirit with the principles above stated by me. See Mr. McKinney's note of satisfaction at the change of position by the supreme court in *Railroad Co. v. Baugh*, 54 Am. & Eng. R. Cas. 364 (s. c. 13 Sup. Ct. 914). That latest and invaluable work on railroads issued this year, in four volumes (Elliott on Railroads), in section 1330, criticises the *Ross Case* as having brought error into some

of the decisions, and in section 1333, having since seen the decisions in the *Peterson Case* and the *Charless Case*, says that they "deny much of the doctrine asserted in the *Ross Case*, and assert a rule which is in line with that asserted by most of the state courts." Elliott says in section 1276 that if the duty be of a nature that is assignable,—one of mere operation, not resting upon the master,—he is not liable. In other words, the right to assign or delegate a duty conclusively implies that the duty is not that of the master, in such a sense as to render him responsible for negligence in its performance. The supreme court of Virginia has recently reviewed all the Virginia cases on this subject, and follows the supreme court in the *Hambly Case*, cited above. In *Railroad Co. v. Nuckols*, 91 Va. 193 (21 S. E. 342), holding that the liability of the master does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice principal, and laying down as the true rule that above stated in this opinion, holding that the test is that where the departments in which the negligent and the injured persons labor are so far separated from each other as to exclude the probability of contact, and of danger from the negligent performance of their duties by employes of the different departments, then the servant is not taken to have contemplated such danger from the other servant in another department, as one incident to his employment, when he entered the service, but that the mere fact that the servant injured is in another department of service does not render the master liable. The rule above stated has the approval of other great text writers: Bish. Non-cont. Law, §§ 665, 671-673. Judge Dillon gives it his emphatic approval, as the only true rule, in 24 Am. Law Rev. 175, quoted in opinion in *Ell v. Railroad Co.* (N. D.) 48 N. W. 222. That case holds the rule that the character of the act, not the grade of the servant, governs. The opinion by Corliss, C. J., is a very strong and clear discussion of the subject. *Murray v. Railroad Co.*, 36 Am. Dec. 279; *Coke Co. v. Peterson* (Ind. Sup.) 35 N. E. 7. See further citations below.

Now let us turn to the West Virginia cases. So far as they define the general rule, I think they are in har-

mony therewith, though in some instances the rule has been misapplied, in making persons vice principals who were only fellow servants. *Riley v. Railroad Co.*, 27 W. Va. 145, recognizes that, to make the master liable for the act of his servant, that act must relate to the discharge of some duty which the master owes to the employe. So, in point 3 of *Madden v. Railroad Co.*, 28 W. Va. 610. So, as I understand it, is the general principle stated in *Daniels v. Railroad Co.*, 36 W. Va. 397 (15 S. E. 162); *Core v. Railroad Co.*, 38 W. Va. 456 (18 S. E. 596); *Flannegan v. Railroad Co.*, 40 W. Va. 440 (21 S. E. 1028). Such is the general principle, but it is often difficult to apply,—to say whether the particular act is one of the duties placed upon the master for the benefit of his servants, and so one that is non-assignable, for which the master is still liable, or one of mere operation. Now, our cases of *Madden v. Railroad Co.*, *supra*, *Daniels v. Railroad Co.*, *supra*, and *Haney v. Railroad Co.*, 38 W. Va. 570 (18 S. E. 748), holding that a conductor is a superior servant or vice principal, and not a fellow servant with other employes, spring from the *Ross Case*, and, I am compelled to say, are not sound in principle. I have always entertained, myself, a different opinion, but thought the *Madden Case* governed us. The prop has fallen from under those decisions. We ought to be right. The supreme court has reversed itself. Why should not we do so? It is not a rule of property. Why is not a conductor a fellow servant with other servants on that or any other train? He is not the head of another department nor working in another separate department, so as to enable us to say that the injured servant did not contemplate the negligence of the conductor as one of the dangers which he might have to encounter. The conductor is simply an operative. He simply carries on the work of actual operation. He uses the track and cars provided by the master for the transaction of his business, just as the engineer and firemen use the engine and the brakemen use the brakes. His functions are purely those of mere operation. As stated above, he is not in another, separate department from other servants on his train, nor performing the work of a separate department, but simply a particular piece of work in the operating department. His mere superiority or power of control in some respects

cannot take him out of that classification or category. Most eminent authority positively settles this. The Supreme Court of the United States so held. Would you say that when the farmer, mine owner, or lumberman sends a lot of hands upon his work in charge of a foreman or boss or overseer,—call him as you may,—he is to indemnify them against the every mistake of the foreman while doing the work? That would make every business very perilous. If not in such case, why should a railroad company be made to indemnify when it sends a lot of trainmen to run its train, under the control of a conductor? It must employ a competent conductor, but not be required to insure against his error of judgment. You can not do so, unless you change the rule laid down in this Court and elsewhere,—that it is the character of the act, not the grade or control of the foreman, that ought to guide. I think an excellent test is put in the last clause of the syllabus in *Valtez v. Railway Co.*, 85 Ill. 500: “Those who are engaged in the service of the same master, in carrying on and conducting the same general business, in which the usual instrumentalities are employed, may be justly called ‘fellow servants.’ A proper test of this relation is whether the negligence of the one is likely to inflict injury on another.” This means that, if one may chance to be hurt from the negligence of another, he is deemed to have contemplated and risked that chance when he entered service, and they are fellow servants. May not a brakeman assume a chance of danger from mistakes of a conductor? The latest railroad law work (Elliott, R. R. § 1330) says: “There is comparatively very little conflict upon the question as to whether trainmen engaged in operating the same train are fellow servants, the very decided weight of authority holding them to be fellow servants. This seems to us the only rule that can be defended on principle; for such employes are, in the strictest sense, engaged in the service of a common master, their service is of the same general character, and the object of the service is a common one. The doctrine declared in a case decided by the Supreme Court of the United States has created some conflict, and, as we venture to say, brought error into some of the decisions, but the case to which we refer can not be regarded as expressing the rule which now prevails in the

federal courts. We can not perceive how the doctrine which declares that employes of the same train are not fellow servants can be upheld without violating the principle that the details of operating a railroad do not pertain to, or form part of, the master's duty. Under the rule which we have stated, conductors, engineers, firemen, brakeman, and baggage masters of the same train are fellow servants. There are cases which apply what is sometimes called the 'doctrine of subordination' to trainmen performing service on the same train. Conductors are usually considered, in the line of decisions just referred to, as superiors, and not as fellow servants; for which heresy the *Ross Case*, so often referred to, is, to a great extent, responsible." In the section of Elliott afterwards written, it is shown that the *Ross Case* has been overruled, as above stated. Elliott, in section 1331, says: "It seems to us that the rule must be the same whether the trainmen are engaged on the same train or on different trains. There is, as we think, no valid reason for discriminating between cases where the employes are engaged in operating the same train, and cases where they are engaged in operating different trains. In both cases they are employed in the same line of service, and by a common master. The weight of authority preponderates very strongly in favor of the doctrine that trainmen, although employed on different trains, are fellow servants, but there is some conflict of authority upon the question." I cite the case decided in 1895, of *Wooden v. Railroad Co.*, 147 N. Y. 508 (42 N. E. 199), holding conductors and other trainmen to be fellow servants. Note, 7 Am. & Eng. Enc. Law, 870; also, *Dorr v. Railway Co.*, 8 Kan. 642; *Jenkins v. Railroad Co.* (S. C.) 18 S. E. 182; *Elevator Co. v. Neal*, 65 Md. 438, (5 Atl. 338); *Knabtha v. Railway Co.*, 21 Or. 136, (27 Pac. 91), and cases cited page 148, 21 Or., and page 95, 27 Pac.; *Heine v. Railway Co.*, 58 Wis. 525 (17 N. W. 420).

I therefore put it as sound law that, as the question of fellow-servantcy depends on the character of the act, the grade or rank of the negligent and injured servant, or whether one had authority or control over the other, is immaterial, and that this rule is supported by the better reason, and the latest and best authority of text writers and court decisions. In addition to those cited above, I

cite 3 Wood, Ry. Law, 1788; 3 Elliott, R. R. § 1316; Wood, Mast. & Serv. § 448; Story, Ag. § 453; Webb, Poll. Torts, 121; 7 Am. & Eng. Enc. Law, 834; *Hankins v. Railroad*, 142 N. Y. 416 (37 N. E. 466); *McElligott v. Randolph* (Conn.), 22 Atl. 1094; *Railway Co. v. Smith* (Tex. Sup.), 13 S. W. 562; *Harrison v. Railroad Co.* (Mich.), 44 N. W. 1034; *Coke Co. v. Peterson* (Ind. Sup.), 35 N. E. 7; *Railway Co. v. Smith*, 59 Ala. 245; *Railroad Co. v. Thomas*, 42 Ala. 672; *Jenkins v. Railroad Co.* (S. C.), 18 S. E. 182; Mechem, Ag. § 668; *Railroad Co. v. Donnelly*, 88 Va. 853 (14 S. E. 692); *Acery v. Meek*, 96 Ky. 192 (28 S. W. 337). I quote in this connection, as very strong, the language of the eminent Judge Cooley in Cooley, Torts, 639: "In some quarters a strong disposition has been manifested to hold the rule [of fellow service] not applicable to the case of a servant who at the time of the injury was under the general direction and control of another, who was intrusted with duties of a higher grade, and from whose negligence the injury resulted. But it can not be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risk of negligent acts or omissions on the part of one class of servants, and not those of another class. Nor, on grounds of public policy, could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful; and, in this regard, it can make little difference what is the grade of the negligent servant, except as a superior authority may render the negligence more dangerous."

The supreme court of Indiana in *Coke Co. v. Peterson*, 35 N. E. 7, says, as I say myself, that this rule of fellow-servantcy is founded in wisdom, and departure from it

dangerous to the prosperity and perpetuity of enterprises of mining, manufacturing, railroading, and those industries requiring the service of many employes; and departure from it would increase the danger of employes themselves, as it inspires diligence and watchfulness to save themselves and co-laborers, as well as their employers. Abandon the rule, and inducement to care is gone, and each workman has nothing to do but look out for his own safety. This doctrine is indispensable in our days of numberless enterprises, operating with innumerable employes and machines and appliances. This doctrine that where the faulty servant is a superior servant having authority over the injured one arose in Ohio, in *Little Miami R. Co. v. Sterens*, 20 Ohio 415. The court became dissatisfied with it in *Railway Co. v. Decinney*, 17 Ohio St. 197, and refused an action by a brakeman against the railroad for negligence of a conductor on another train. The dissenting judge said it was a departure from the former decision. He admitted that the rule of the *Little Miami R. Co. Case* was contrary to the rule outside Ohio, "that a servant, without regard to his grade of authority or position, cannot maintain an action against his employer for the fault of a fellow servant." The former case allowed an action by engineer for negligence of the conductor on same train. The dissenting opinion in the *Little Miami R. Co. Case* is very elaborate and strong in support of the true rule. From *Avery v. Meek* (Sept., 1893), 96 Ky. 192 (28 S. W. 337), the Kentucky court seems to qualify its former holding by saying (after admitting that the rule in a majority of states is as above given) that one servant cannot recover for negligence of a servant superior in authority unless it be gross,—an unreasonable distinction. It may be that *Allen v. Goodwin* (March, 1893), 92 Tenn. 385 (21 S. W. 760), shakes the former rule in that state. 1 Bevin, Neg. 835, states the English rule to be that at common-law "a master is not liable to any servant for any injury which arises from the act or default of any fellow servant, whether that fellow servant be in a position of authority or not." (See note at close of opinion).

For these reasons, I think that Jackson and Gilbert were fellow servants. There is another feature of this case, strengthening the position, though not necessary to its

support, that they were such fellow servants, in this: Suppose we concede that a conductor, in his own line of duty, is a vice principal,—as he is not; yet here he was performing simply the work of a brakeman, in waving to the engineer. Plainly, this was an act of mere operation of the cars by hands,—not a duty of the company. In *Drainage Co. v. Fitzgerald* (Colo. Sup.) 43 Pac. 210, the opinion said that: “When the manager or vice principal undertakes work in simple co-operation with other servants, and upon precisely the same footing with them, he becomes for the time being a mere fellow servant with them, acting as such. Thus, for example, a conductor while acting as such in starting or delaying a train, in warning or failing to warn the other train hands, or in any other respect performing the usual duties of a conductor, is not, under the American rule, a fellow servant with a brakeman on the same train. But, when he offers to assist the brakeman in handling his brakes or in coupling cars, he acts only as a fellow servant, such work being no part of the duty of a conductor as such.” “If the negligence complained of [that is, the negligence of the vice principal] consists of some act done or omitted by one having such authority which relates to his duties as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable.” “The better rule, as we extract it from the best reasoned cases, is that for the acts of the vice principal done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, the master is liable, while for all such acts as relate to the common employment, and are on a level with the acts of the fellow laborer, except such acts done by the vice principal against the reasonable objection of the injured servant, the master is not responsible. In other words, the test of liability is the character of the act, rather than the relative rank of the servants.” See *Ell v. Railroad Co.* (N. D.), 48 N. W. 222; *Green J., Criswell v. Railway Co.*, 30 W. Va. 814 (6 S. E. 31); *Core v. Railroad Co.*, 38 W. Va. 456 (18 S. E. 596); *Rodman v. Railroad Co.*, (Mich) 20 N. W. 788; 3 Elliott, R. R. § 1319. This position may not be so clear; for, if the conductor be vice principal,

then the act is as if done by the master in person, and, no matter what the character of that act,—one of mere operation or not,—if done by the master in person, he is liable. So held in *Stone Co. v. Kraft*, 31 Ohio St. 289.

It is said in argument that the declaration is bad because it does not negative the idea that the injury emanated from the act of a fellow servant. It charges that the cars were, “by the wrongful and negligent acts of the defendant company, its agents, servants, and employes, wrongfully, carelessly, violently, and negligently precipitated on and against said infant plaintiff.” I do not think that the declaration need allege the position of the negligent servant, or show affirmatively that he was not a fellow servant. In some states such would be required, but in this State it is sufficient to charge generally the act as having been negligently done, without negating the fellow-servantey, just as it is settled in this State that such a general charge of a negligent act is sufficient, without negating contributory negligence.

Contributory negligence: This debars the plaintiff from recovering. He says that he was attempting to couple to some cars standing on the track a train composed of an engine and six or seven loaded coal cars, which was being backed up to the standing cars. He says the cars came together without coupling, and did not couple, and he then waved the engineer down, and the train separated from the cars a distance of six feet, and there stood, and that he went in to couple the cars, and that Gilbert, standing on the car of the moving train above him, instead of waiting for Jackson to signal the train to back again, himself signaled it, and brought the train too quickly back, and caught his arm in between the bumpers, and mashed his arm from the wrist to the elbow. Now, Gilbert denies having given any signal, but says Jackson did so. Gilbert and two other witnesses in their evidence substantially show that Jackson signaled the train to back, and that it did not stop before Jackson received his injury. The feature of the case seem to show that Jackson signaled the train, and by carelessness, or want of that great caution and prudence conforming to the usage of brakemen, received the injury. The cars were on a sharp curve. He went between them, on the inside of the curve, thus en-

dangering himself from being pinched by the corners of the cars, whereas he should have gone in, under the practice of brakeman, on the outside of the curve, and the bumpers would there have saved him from any accident, if he had not placed his hand directly between the bumpers, contrary to the rules of brakemen and the plainest principles of self-preservation. Being on the inside of the curve, to avoid being pinched at the corner he would naturally press too close to the bumpers, and the more likely injure himself, while on the other side he could have stood a considerable distance from the bumpers and been safe. But, at any rate, why should he have had his whole forearm directly in front of the bumpers, when, as he and all others show, in coupling the arm should be below those bumpers, simply taking hold of the link, and directing it so as to enter the drawbar of the car. The bumpers are made for the very purpose of bumping against each other, and keeping the cars from coming closer together, and saving the brakeman. He did a thing of manifest danger,—dispensed with the use of the appliances prepared by the employer to save him,—by placing his arm in the very place where it would surely be caught, without call for so doing. At no time, under no circumstances, had he the right or need to put his arm there. A man engaged in such dangerous work is bound to use the most astute caution and care. He was an experienced brakeman. Now, let us discard the idea that Jackson waved the train back, and say that Gilbert did that. It may be said that Jackson was not expecting the conductor to wave the train back, but to give the signal himself, and therefore did not have his arm in the right place. He says that when the cars first came together they would not couple. Then he waved the engine down, and went in to make the coupling, the conductor standing on the car above him, and “as I aimed to make the coupling he [the conductor] waved the engineer back; and I saw him and aimed to jump back, but before I could do so, the cars caught me” (using his own words). Now, the backing train was six feet off. Jackson says he saw the conductor wave the train back. Then he had time to get out, or to properly place his arm and hand under the bumpers, for he and all say that the train had seven loaded coal cars to back up a very steep

grade on reverse curves,—the track slippery (having to sand it), the engine slipping, and the movement very slow. Jackson complains that the conductor waved the train back before he was ready for it; yet he says he saw him wave; and surely he could prepare or get out while this loaded train was starting and going the six feet in its very slow, labored movement. All the evidence shows that the engine could scarcely back its cars up that steep grade and sharp curve. He had timely warning to take his arm away. It should never have been there. Gilbert denies waving the train back, and it looks like Jackson did, because, if he had, we would expect him, after doing so, to be in between the cars to couple them; but, if he had not given the signal, hardly so. Say, however, that the conductor did wave the train back, and that Jackson did not see him, though he says he did; it is scarcely possible that with a lantern, Jackson would not see the train start its movement and come back soon enough to get out of the way, or prepare for it. So we can say that he did not use that care and caution required in such dangerous business. Is it justice, between man and man, to hold the employer liable under such circumstances? Had it not been for the negligence of Jackson in a place calling for the most watchful prudence, the misfortune would not have happened. Reversed and new trial granted.

NOTE BY BRANNON, JUDGE:

Upon the important question of fellow servanty, I add the following late authorities, taking the view above taken: *Denver & C. v. Sipes* (Colo.), 47 Pac. 287 (1896); *St. Louis v. Needham*, (Ark.) C. C. A., 63 Fed. Rep. 107, full opinion; Bishop Non Contr. Law, sec. 665; *Callan v. Bull*, 113 Cal. 593 (1896), holding that while a superintendent is a vice principal as respects suitable appliances which it is the duty of the master to furnish, yet if employes are to construct them out of material furnished them, "all, including superintendent, are fellow servants irrespective of rank as to any defect or negligence in their construction or adjustment, and the master not liable for such defect or negligence"; *Miller v. Southern Pac.* (Ore.), 26 Pac. 70. In Dec. 1896, the circuit court of Pa. criticised the *Ross Case* and held the same view which I express above, that it has been practically overruled by the cases I cite. *Coulson v. Leonard* 77 Fed. Rep. 538; *McGinty v. Attrol*, 155 Mass. 183, holding superintendent and workmen fellow servants. The opinion in *Colo. Coal Co.*

v. *Lamb* says that the late cases in supreme court overrule the *Ross Case*. 6 Colo. Court App. 255.

I see that in *Norfolk & Western R. R. Co. v. Houchins* (decided Dec. 2, 1897), the Virginia Supreme Court has, in a clear strong opinion by Caldwell, J., squarely approved our decision in the above case. The U. S. Supreme Court (1897) has re-enunciated the same views given in recent decisions above cited. *Mining Co. v. Whelan*, 168 U. S. 86 (18 Sup. Ct. 40).

DEXT, JUDGE (*dissenting*):

I am compelled to dissent in this case, to be consistent with the position taken in the case of *Flannegan v. Railroad Co.*, 40 W. Va. 440 (21 S. E. 1028), as follows, to wit: "The doctrine, as recognized and enforced in this State, is that it is the personal and non-assignable duty of the master—First, to exercise reasonable care in providing and keeping in repair suitable machinery, and all necessary appliances, including a safe place to labor; second, to exercise a like care to provide and retain suitable servants for each department of service; third, to establish, conform to, and enforce compliance with proper rules and regulations. These are the superior duties, for the proper performance of which the master is responsible, whether he entrust them to a department, or any employe of any grade, and the neglect of which by the agent or agency to which they are intrusted renders the master liable to any one injured by reason of such negligence, against whom and to whom contributory negligence cannot be shown or imputed from his own act or the act of a fellow servant, whether it be of commission or omission. *Daniel's Adm'r v. Railway Co.*, 36 W. Va. 397 (15 S. E. 162); *Cooper v. Railway Co.*, 24 W. Va. 37; and other cases heretofore cited; also, *Schroeder v. Railway Co.*, 108 Mo. 323 (18 S. W. 1094); *Foster v. Railway Co.*, 115 Mo. 165 (21 S. W. 916). The decisions of many jurisdictions are not in line with our decisions on this subject. 7 Am. & Eng. Enc. Law, 821, tit. 'Fellow Servants.' The rule of *stare decisis* applies with impregnable force in this instance, and from which there is no way of escape, even if the court were so inclined, unless by an utter and reprehensible disregard of all precedent." The majority of the Court, however, appear to have arrived at a different conclusion, and have determined, in disregard of its former decisions, to start

on the promulgation of an entirely different rule, dependent on the principles of fellow service.

Under the doctrine as heretofore established by this Court, the liability of the master was not determined by the rank or title of the employe or servant, but on the duty that he was called upon to perform or discharge. If such duty was a non-assignable, sometimes called "positive," duty of the master, the master was liable for the servant's negligence, to any person injured thereby; but, if an assignable duty, the master was not liable. So that, in determining whether the servant was for the time being the agent or vice-principal, his rank was not considered; but the duty he was in the act of performing was alone decisive of the question, although it is generally recognized that the duties of the master are more apt to be imposed on those of his servants who hold superiority in rank. It was improper, therefore, to hold that any officer or employe was at all times, by reason of his employment or rank, a vice principal. And it is just as improper to hold that an officer or employe, by virtue of his employment, is at all times the fellow servant with those with whom he is working, whether in a superior or inferior capacity. The main question in every case of negligence was not whether, generally speaking, the servant in fault was the superior or inferior in rank of the injured party, but whether the duty the negligent servant was called upon to perform was a non-assignable duty of the master, and from this duty alone his temporary position of vice principal or fellow servant was determined. The effect of the present opinion is to change this law, and to hold that a conductor, it matters not what duty may be imposed upon him by the master, as to all the other trainmen, whether on his train or on other trains, is a fellow servant; in short, that the duties of all the employes in the operating department of the road make them fellow servants, it matters not the relationship they bear to each other, nor that the duties they may be called upon to discharge may be what have been heretofore designated by this Court, and even in the opinion of JUDGE BRANXON, to be the non-assignable duties of the master. Among these non-assignable duties is the duty to furnish a safe place to work,—that is, as to trainmen, a safe track, not only in construction, but free from

dangerous obstructions of every kind,—and also to adopt, promulgate, and enforce safe and proper rules for the conduct of business, including the government of the machinery, and the running of trains on a railroad track. Mr. Bishop sums up the the duties of the master to be “watchfulness of ways and appliances.” In the case of *Riley v. Railway Co.*, 27 W. Va. 145, it is held: “When a railroad company puts a superintendent, foreman, or other employe in its place to discharge some duty which it owes to its servants or employes, as to such duty such superintendent or other employe is not a co-servant, but the representative of the company, and as to such duty the company is bound by the acts or omissions of such middleman, the same as though the acts had been done or omitted by the company itself.” This is the doctrine of vice principal, as settled in this State, first announced in the case of *Cooper v. Railway Co.*, 24 W. Va. 37, and followed in *Madden v. Railway Co.*, 28 W. Va. 610; *Criswell v. Railway Co.*, 30 W. Va. 798 (6 S. E. 31); *Daniel’s Adm’r v. Railway Co.*, 36 W. Va. 397 (15 S. E. 162); *Core v. Railroad Co.*, 38 W. Va. 747 (18 S. E. 596); *Haney v. Railway Co.*, 38 W. Va. 570 (18 S. E. 748); *Flannegan v. Railroad Co.*, 40 W. Va. 440 (21 S. E. 1028),—all of which cases are overruled by the present case, in its effect, although the language is not made to so express.

In the case of *Railroad Co. v. Peterson*, 162 U. S. 353 (16 Sup. Ct. 843), Mr. Justice Peckham says: “If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which in such case is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform, as such.” This language is in perfect harmony with former decisions of this Court cited above, and to which the Supreme Court of the United States continues to adhere. McKinney, Fel. Serv. 104, states the general rule to be that the master’s duty to his employes is fully performed when he establishes and promulgates proper rules and regulations. With the carrying out and enforcement of such rules and regulations he has nothing to do. After the master has completed, furnished, and equipped the road,

and adopted rules and regulations, his duty towards his employes is at an end. If they disregard the rules, and operate the road at liberty, and thereby render the employment extra-hazardous and dangerous, the master is not liable to his servants injured thereby. Such is the conclusion of the opinion in this case, but such is not the law of this State, as heretofore settled by the decisions of this Court. They hold that, if a master engages in the *quasi* public operation of running a railroad, it is a duty incumbent upon him, both to the public and individuals, not only to adopt and promulgate proper rules, regulations, and schedules for the separate divisions of his business, called "trains," but also to keep a watchful and superintending eye over his whole road, to see that these rules, regulations, and schedules are faithfully adhered to and carried out, and if, for any unforeseen cause, they are interrupted, hindered, or rendered impracticable, to substitute necessary special arrangements in lieu thereof. And as the master cannot be omnipresent, or, being a mere fiction of law, known as a "corporation," cannot be present at all, such duties must be performed by persons expressly delegated for the service, commonly known as "vice principals." So that it may, and often does, happen that each and every employe of a railroad may be called upon to fill the important position of a vice principal. For instance, when a train starts from one end of the road the track may be dangerously obstructed, in a manner not known to the trainmen, by numerous other trains running on or out of time, or by washouts, slips, bowlders, or otherwise; and it is the duty of the master, who is required to vigilantly guard the track, to notify the trainmen of these various obstructions, which duty he may impose on a conductor, brakeman, watchman, or other employe, and, if such employe fails to give the required notice or warning, his failure is imputed to the master. The holding of other courts is that all the master is required to do is to furnish competent servants to watch the road and give warning of obstructions, and for their negligence he is not liable. But this Court has heretofore held that these are positive duties of the master, which he cannot delegate in such manner as to escape liability. If we are to be guided by precedent, and follow the beaten track

marked out by our predecessors, it becomes equally erroneous to hold that a conductor, as such, is a fellow servant of the other trainmen, as to hold that he is a vice principal, without regard to the duty he is discharging. The decision in the present case abandons the old road, and, flying off at a tangent, undertakes to follow a path pointed out by certain text writers as the main highway pursued by the courts of other states whose doctrines are less settled than our own, and greatly limits in extent the non-assignable or positive duties of the master, even tending towards their entire abrogation, and which will be the natural sequence if the course evidently indicated is pursued, when it will be finally determined that all servants of a common master, without regard to rank, authority, or duty, are fellow servants, and thus wholly relieve the master from liability to them on account of the negligence of each other. It is better to have the law settled, even though it operate harshly, than to have a state of confusion produced by a continual abandonment of former maturely considered principles. I concur in the conclusion, but not in the principles stated contrary to the former decisions of this Court.

Reversed.

CHARLESTON.

MORRISON v. WAGGY *et al.*

Submitted January 29, 1897—Decided April 21, 1897.

43	405
44	33

1. **VENDOR AND VENDEE—Option—Rescission of Contract.**

Where a person holding a limited optional contract for the sale of a tract of land is prevented from making sale thereof by reason of a cloud on the title, or a deficiency in quantity, not known or taken into consideration at the time of the execution thereof, such person is entitled to a rescission of such contract. (p. 409.)

2. **MARKETABLE TITLE.**

A marketable title is one that is free from reasonable objection to a reasonable purchaser. (p. 411.)

3. CLOUD ON TITLE—*Adverse Claim—Recorded Title.*

If there is an adverse claim to a tract of land, or a considerable part thereof, evidenced by recorded title papers, with possession thereunder in dispute or doubtful, such adverse claim is sufficient to throw a cloud on the title, and render the same unmarketable until such title papers are canceled. (p. 409.)

4. SUIT TO CANCEL OPTION—*Parties—Quieting Title.*

A person holding such adverse title is not a necessary party to a suit instituted to cancel a lapsed optional contract for the sale of such land for the purpose of preventing the recovery of the consideration on the grounds of the failure thereof, as it is not necessary to, nor can the disputed question of title be settled in such suit, as the plaintiff is no longer interested therein, except in so far as it rendered the title bargained for by him unmarketable. (p. 408.)

Appeal from Circuit Court, Braxton county.

Bill by J. W. Morrison against Henry Waggy and another. From a decree for plaintiff, defendants appeal.

Affirmed.

LINN & BYRNE, for appellants.

DULIN & HALL, for appellee.

DENT, JUDGE:

Henry Waggy and F. J. Baxter appeal from a decree of the Circuit Court of Braxton county in a chancery cause therein pending wherein they were defendants and J. W. Morrison was plaintiff. The plaintiff, in his bill, alleged: "That on the 8th day of February, 1888, he entered into a contract with defendant Henry Waggy, by which he conditionally purchased a one undivided moiety of nine hundred acres of land situated in the county of Clay, on the north side of and adjacent to Elk river, and known as the 'Jack Bend Land,' and the defendant agreed to convey the same to him by deed of general warranty. Said contract is in the words and figures following, to wit: This deed, made this 8th day of February, 1888, between Henry Waggy, of the first part, and J. W. Morrison, Jr., of the second part, all of the county of Braxton and State of West Virginia, witnesseth: That in consideration of three thousand dollars, to be paid as hereinafter specified, the party of the first part do grant, bargain, and sell unto the party

of the second part the one undivided moiety of 900 acres of land, situate in the county of Clay, on the north side and adjacent to Elk river, and known as the "Jack Bend Land," the said land to be surveyed and plat made of same at the cost and expense of the party of the first part; and this sale is by the acre at the price of \$6.66 $\frac{2}{3}$ per acre; said survey and plat to be made on or before the 1st day of May, 1888. The above contract is subject to the following conditions; that is to say: The party of the second part agrees, and by these presents binds himself, to pay to the party of the first part six *per cent.* interest, to be paid annually, on the said \$3,000.00 aforesaid, for five years, and at the expiration of the five years from this date, if the said principal aforesaid is not paid, then, in that event, the said land is to revert back to the party of the first part; but that the said party of the second part has the privilege at any time to pay off and discharge the said principal, thereby giving to him an absolute title to said land. The said party of the second part is to pay the taxes on said land during said option, signed in duplicate. Henry Waggy. J. W. Morrison, Jr.'"' That his object was to make a sale of the land for the coal and timber thereon. That it afterwards turned out that there was a considerable deficiency in said land, and that an additional two hundred acres thereof had been patented to C. C. Campbell, and was now owned by and in possession of Claiborne Pierson; which facts produced such a cloud on the title that he was unable to make a sale thereof during the life of his contract. "That he notified said Waggy of said Pierson's claim to said land, and told him that if he would free the land of said claim he would pay him the money stipulated for in said contract; but Waggy failed to do so," but after the expiration of the contract, instituted an action of *assumpsit* to recover the annual payments of interest and the taxes during the five years the contract was to run. And he prays that the suit at law be enjoined, and that the contract be canceled. Waggy demurred to the bill, and required that Claiborne Pierson and Felix J. Baxter be made parties, which was accordingly done. Waggy answered, admitting that there was only eight hundred and thirty-four acres in the two tracts of land a moiety of which he sold to the plaintiff, but he insisted that the

Pierson claim only covered one hundred and twenty-seven acres thereof, and denied that Pierson had adverse possession thereof, or that his title was a cloud on the land in controversy. And he "further says that plaintiff never made any objection to the title of respondent to the Jack Bend land, or notified him of Pierson's claim to any part thereof, until the very day or the day after said contract between plaintiff and respondent expired, when, of course, it was too late for respondent to take any steps to satisfy plaintiff of the fallacy of Pierson's claim, if any he asserted thereto." He also denies that plaintiff was prevented from making a sale thereof by reason of any cloud thereon, or that he was to make him a general warranty deed for the land, but insists that he was to convey him such title as he had without warranty. Pierson also filed his answer, setting up his title to two hundred acres of the land, and claiming the same to be indefeasible. Many depositions were taken in the case, and the court, on hearing, canceled the contract, and perpetuated the injunction. The appellants insist that the court erred in not deciding the Pierson title invalid, and in not dissolving the injunction.

It is proper to first say that both Pierson and Baxter were improperly made parties to the suit, as they were in no wise interested in the litigation, as it made no difference to them whether the court canceled the contract, or dismissed the bill for want of equity. This was not a suit for specific performance, but to cancel a contract which was *functus officio* for failure of consideration to prevent it being used unconscionably in a court of law to the peril of the rights of an innocent party thereto. 21 Am. & Eng. Enc. Law, 48. Such jurisdiction reposes in a court of equity, although defense might be made at law. Code, c. 126, s. 6; *Knott v. Seamands*, 25 W. Va. 99; *Bias v. Vickers*, 27 W. Va. 456. The mere fact that the court makes unnecessary parties to the suit does not authorize a decree between the defendants in which the plaintiff is in no wise interested. If this was a suit on this same contract for specific performance, a different rule might prevail; but, the contract being dead, the plaintiff could neither ask nor be required to take the land the title to which is in controversy. Nor could the court try an eject-

ment suit between the defendants. The demurrer to the amended bill by Pierson should have been sustained. The evidence of Waggy shows that in the month of February, 1893,—some time before the contract expired,—both by letter and interview, the plaintiff informed him that if he would clear up the title he would pay him the stipulated price for the land; thus positively contradicting the allegation of his answer to the contrary. It also appears from the evidence that, if there had been nine hundred acres of the land, and the title had been unclouded, the plaintiff was in a fair way to and might have accomplished a sale. The patent to C. C. Pierson and the deeds to Pierson were intended to cover two hundred acres of this same Shamblin land, and to that extent created a cloud on the title thereof, and must necessarily, appearing on the records, interfere with a fair sale. The question of possession is, indeed, left in grave doubt, but this very fact is sufficient to prevent a sale, as few persons care to purchase a law suit unless at least a reasonable discount or sacrifice. To increase this doubt, there is evidence tending to show that the original claimant, Shamblin, abandoned all his rights in the two hundred acres covered by the junior patent, and acquired under such patent, and admitted the possession of the patentee thereunder. The circuit court did right, therefore, not to attempt to decide the question of title between the defendants, if for no other reason because the defendants Waggy and Baxter failed to show such actual possession as would authorize a court of equity to annul the title papers of Pierson as clouds upon their title. *Christian v. Vance*, 41 W. Va. 754 (24 S. E. 596).

There is still a further reason why this contract should be canceled. Contracts, to be binding, must be mutual. If there is a serious difference or misunderstanding owing to the abstruse or equivocal wording of the contract, evidently showing that the minds of the parties thereto never met, then there never has been a contract, and equity will relieve the innocent party from a writing by which he has been deceived.

The plaintiff insists that he was entitled to a deed for the land, with covenants of general warranty, and he introduces evidence to show that the words "absolute title" used in the contract were so understood by the parties at

the time of the making thereof; while the defendant Waggy insists that he was to convey such title as he had without any covenants of warranty. If the defendant's contention be true, and the plaintiff was deceived thereby, the whole contract evinces a deep-laid scheme on the part of the defendant to obtain a large sum of money without consideration: for he bargains to him a tract of four hundred and fifty acres of land for the full and adequate consideration of three thousand dollars, granting the title to be indefeasible, and, if he decided not to take the land, to pay at the end of five years interest and taxes, aggregating, according to defendant's claim, about one thousand five hundred dollars,—half of the speculative value of the land,—for the mere privilege of representing an unsalable title. The object of the plaintiff was to sell, and not to purchase, himself; and, if he was deceived into accepting something that was unmarketable, equity will relieve him as against the attempted perpetration of fraud. Defendant, by denying a sale with warranty, stands self-convicted. The sale was evidently by the acre, and yet on assurance that there were four hundred and fifty acres, for the total sum agreed upon was three thousand dollars, on which plaintiff was to pay interest, which was the full consideration for that number of acres at the price agreed upon. Yet the defendant admits a considerable deficiency without regard to the Pierson claim: a deficiency so large that it could not have been taken into consideration in fixing the sum of three thousand dollars. *Pratt v. Borman*, 37 W. Va. 715 (17 S. E. 210); *Anderson v. Snyder*, 21 W. Va. 632; *Crislip v. Cain*, 19 W. Va. 441. In case of a deficiency of this character, the purchaser has the right to ask for a rescission of the contract.

The cases referred to by appellants' counsel, including *Borman v. Duling*, 39 W. Va. 619 (20 S. E. 567); *Hearner v. Morgan*, 30 W. Va. 335 (4 S. E. 406); *Kinports v. Rawson*, 29 W. Va. 487 (2 S. E. 85); and *Smith v. Parsons*, 33 W. Va. 644 (11 S. E. 68),—are not in point, from the fact that in all these cases there was an actual sale of land, and not a mere optional contract. In the former case the purchaser buys for himself, while in the latter the optional purchaser only contracts for the purpose of re-sale, and hence any defect in title or quantity

which prevents a sale destroys the consideration for the contract unless such defects were had in view at the time of the making thereof. *Rader v. Neal*, 13 W. Va. 373. If the parties can not be placed in *statu quo*, it is the fault of the appellant Waggy, by reason of his title being defective both as to quantity and quality; and, while he apparently loses the rent of this wild land, and is compelled to pay the taxes thereon, plaintiff loses his time and labor in attempting to make sale of an unmarketable subject, and his prospective profits had such sale been consummated. It is true, he became aware of the cloud on the title, and still continued to try to make a sale; but when he found he could proceed no further he notified the appellant Waggy of the fact, and of his readiness to pay the price agreed, provided the title was made good. The appellant, however, made no offer to do so either by way of warranty, retention of purchase money, or indemnity, but permitted the contract to lapse, and then instituted his suit at law. In 22 Am. & Eng. Enc. Law, 948, under the head of "Specific Performance," the law is stated: "The vendor must be ready and able to convey a marketable title—which has been defined to be 'a title that is free from reasonable doubt'—to all the land which he has bound himself to sell. He must be ready to convey all he has agreed to convey." Before the purchaser can successfully resist performance on his part on the ground of defect of title, there must be at least a reasonable doubt of the vendor's title,—such as affects its value, and interferes with its sale to a reasonable purchaser, rendering it unmarketable. There can be no doubt but such was the case as to the Waggy title, both as to quantity and quality, and the circuit court did not err in canceling the contract and perpetuating the injunction. The decree is affirmed.

Affirmed.

CHARLESTON.

PIFER v. BROWN.

Submitted January 29, 1897—Decided April 21, 1897.

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| 43 | 412 |
| 446 | 449 |
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1. PAROL LICENSE—*Drainage—Revocability of License.*
 ✓ A parol license from one lot owner in a town to another to pass a tile drain under the former's lot for the purpose of draining the lot of the latter is revocable at the pleasure of such licensor. (p. 427.)
 2. EASEMENT—*Deed—Drainage.*
 To entitle a party wishing to drain his lot under the surface of his neighbor's lot by a right not subject to revocation at the will of such neighbor, the privilege of so doing must be acquired by deed. (p. 427.)
 3. EASEMENT—*Deed—Drainage.*
 ✓ The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred except by deed or conveyance in writing. (p. 426.)

Appeal from Circuit Court, Upshur county.

Bill by F. C. Pifer against Margaret N. Brown. Decree for plaintiff, and defendant appeals.

Reversed.

SAMUEL V. WOODS, for appellant.

U. G. YOUNG, for appellee.

ENGLISH, PRESIDENT:

This was a suit in equity instituted in the Circuit Court of Upshur county by F. C. Pifer against Margaret N. Brown. The plaintiff in his bill alleged that he was the owner of a lot of land in the town of Buckhannon, in said county (describing it, and exhibiting a copy of the deed from John D. Martin and wife to himself, dated the 3d December, 1884), and further says that in the month of October, 1894, after a destructive fire in said town, the frame building owned by him, in which he carried on business as a druggist, was completely destroyed; that he at once set to work to erect an expensive brick building on said lot, and had made excavations for a ground room or

cellar extending several feet below the surface of the earth, and constructed around it a stone wall, — feet thick, for a foundation to the main structure, and as a part of said underground room; that said wall and foundation is of solid stone masonry, and built at very great expense; that in order to make said lower ground room useful, and to maintain good sanitary conditions about said building, it was and is necessary to keep said room or cellar well drained, and to this end plaintiff constructed a ditch from said room or cellar, by the most natural and practical course of drainage, through the lands or lots of adjoining owners to the nearest running stream or brook leading to Fink's run, and thence to the river; that plaintiff first obtained permission from all of such owners before proceeding to construct said underground sewerage; that among the lots through which said underground sewerage was constructed was a lot owned by the defendant, which was conveyed to her by Tom G. Brady and wife by deed dated the 3d day of May, 1886, a copy of which deed is also exhibited. The plaintiff further alleges that, before doing any work on said sewerage, he went to Dr. R. L. Brown, the husband of the defendant, who, acting for the defendant, agreed with plaintiff, and gave him permission to construct said sewerage through the lot of defendant upon condition that he (the said Brown) and the defendant should be allowed to tap said sewerage, if at any time said defendant desired to do so, to drain her own property, to which plaintiff assented; that while plaintiff was constructing said sewerage, but before any work had been done upon the property of the defendant, plaintiff went to the defendant, and said to her that he hoped she would not think he was taking too much liberty with her property; that he had had an understanding and agreement with her husband, Dr. R. L. Brown, about constructing an underground sewerage through her lot, and defendant replied to plaintiff that it was all right, to go ahead with his work, which plaintiff did; that plaintiff dug a ditch through the garden part of defendant's lot, as well as through the lots of the other property owners, leading from the lower room or cellar of his said lot, for the purpose of draining it, about four feet deep, and placed therein well-jointed earthen tiling, six inches in diameter, the whole distance

of said ditch, and, after so planting said tiling, plaintiff filled in the dirt on said tiling, completely covering the same and completely filling said ditch; that said drain or sewerage was constructed at great expense to plaintiff; that it extends through the property of the defendant for the distance of about fifty feet; that defendant lives on said lot, and was living on the same when plaintiff was having said ditch dug and said tiling put down, and saw said work being done, and permitted and agreed to the same; that plaintiff, as part of the consideration, put in a six-inch tiling to drain the property of defendant, if at any time she desired to tap the same, at an additional cost to him, when a two-inch tiling would have fully answered his purpose; that it is absolutely necessary to the use of plaintiff's property that said underground sewerage and drainage be constructed, and that it is very essential to the health of the town that it be drained; that said ditch does not in any way interfere with the use of defendant's property, and in fact benefits it, by serving as drainage of the surface water which collects on said lot of defendant, which is low, and needs draining, especially at the point through which plaintiff constructed said ditch or drain. Plaintiff further says that said drainage or ditch was constructed, tiling laid, and completed, in the first part of last January; that the same was in use from that time until the 1st of March of this year, when the defendant dug down into said ditch where it was constructed through her property, or caused it to be done, as plaintiff is informed, and took out, or caused to be taken, two whole joints of the tiling which had been planted therein for the purpose aforesaid by the plaintiff, destroying the connection, and obstructing the drainage of plaintiff's property, and rendering useless to plaintiff said underground sewerage, which plaintiff had constructed at great expense. Plaintiff further says that he suffers an irreparable injury and damage to his property by reason of said obstruction; that said ditch or drain was constructed with assent of the defendant; that said assent was given in consideration of the advantages said ditch or drain would be to defendant's property in draining it, and for the further consideration of the privilege extended to defendant of tapping said ditch or drain when she desired to drain the water from

her residence or otherwise, and for other considerations; and that said right was accepted upon the assent of the defendant, and the said drainage or ditch constructed and used, and said expenditures made, upon that assent. The plaintiff therefore prayed that an injunction be granted him, restraining and enjoining the defendant from further obstructing and disturbing said ditch or drainage, and requiring said defendant to restore and repair said ditch or drainage so obstructed and disturbed by her, and from in any way interfering with plaintiff's rights in said ditch or drain. On the 11th day of march, 1895, an injunction was awarded as prayed for, to take effect when the plaintiff, or some one for him, should execute bonds therein required, in the penalty of three hundred dollars, which order was complied with. The defendant demurred to the plaintiff's bill, claiming that it was not sufficient in law: First, because the bill does not show upon its face that there was some note or memorandum in writing, signed by the party to be charged thereby, or his agent, giving the plaintiff the easement or right claimed in his bill; second, because the bill does not clearly and specifically set forth the grounds for the alleged irreparable injury to the plaintiff, so that the court may pass upon the facts thus alleged as a matter of law. The defendant Margaret N. Brown filed her separate answer, putting in issue the material allegations of the plaintiff's bill. Several depositions were taken by the plaintiff and defendant, and on February 25, 1896, the cause was finally heard, and it was decreed that said demurrer of defendant be overruled; and the court being of opinion that the cause was for the plaintiff, and that he was entitled to the relief prayed for in the bill, perpetuated said injunction, and perpetually restrained and enjoined the defendant, Margaret N. Brown, from disturbing or obstructing the drain in this cause mentioned, and from this decree the said Margaret N. Brown obtained this appeal.

The first error assigned and relied upon was claimed to be in perpetuating the injunction awarded to the plaintiff; the second error was claimed to be in overruling the demurrer of the defendant to the bill; and the third, in denying the defendant affirmative relief prayed for in her answer. The first two assignments of error are so inti-

mately connected, both being dependent upon questions of law and fact suggested by the pleadings in the cause, that we may consider them together, and in the first case we may consider what is shown by the weight of testimony to have been the true state of facts in regard to the consent or permission given to the appellee by the appellant, Margaret N. Brown, or her husband, Robert L. Brown, to construct the sewer mentioned in the plaintiff's bill across the lot owned by said Margaret N. Brown. Upon this question, Dr. R. L. Brown, in answer to the fifth question asked him, which reads as follows: "State, please, whether you ever made any agreement with the plaintiff, or gave him any consent to dig, construct, or lay that ditch through the lot of the defendant,"—replied: "I never gave him any consent, or any permission of any kind, direct, or indirect, written or verbal, to dig a ditch or use a ditch through the lot of my wife, in Buckhannon, where I am informed he has dug a ditch 88 feet 9 inches long, and 4 feet deep, for the drainage of his building on the corner, or for any other purpose." On the other hand, Loyd J. Wells, a witness for the plaintiff, in answer to question two, when asked, "What conversation, if any, did you hear between F. C. Pifer and Dr. R. L. Brown concerning the construction of said ditch through defendant's lot?" answered: "I heard Mr. Brown tell Mr. Pifer he could go through there. I never heard anything said about damages, any way. I heard Mr. Brown say that he might want to tap the ditch some time, and he also said, when he dug the ditch,—when he put the tiling in,—to put the clay dirt on the bottom and the rich dirt on the top. Mr. Brown allowed that it would be an advantage to his lot; that it wouldn't be no disadvantage." And in answer to another question this witness stated that this conversation occurred some time in December. Spencer Boylen, another witness for the plaintiff, in his deposition says, "Mr. Pifer said he would see Mr. Brown, and see if he could get permission," in response to a question asking, "what conversation, if any, did you hear between F. C. Pifer and Dr. R. L. Brown concerning the construction of a ditch through the lot of the defendant, as laid down on the plat by a green line?" The witness proceeds as follows: "A few days after, Mr. Pifer was there on the work. He said

he would go and see Mr. Brown about getting permission. He was gone some little time and he and Mr. Brown came up on the wall where we were at work. The first thing that I remember of hearing Mr. Brown say was, 'Be sure and put it low enough, so it will not interfere with my garden.' Mr. Pifer told him he would do that; that it would have to go into the ground pretty deep, so it would drain from the bottom of his cellar. They talked on there for some little time about the putting up of a wall and the building, and the last thing I remember of hearing Mr. Brown say was to be sure, when they put back the dirt, to put the good dirt on top." A. B. Clark, another witness for the plaintiff, was asked this question: "State what you may know of an agreement between F. C. Pifer and Dr. R. L. Brown to drain the cellar of F. C. Pifer by digging a ditch through Mrs. Brown's lot to intercept the drain or ditch through N. C. Louden's lot." Replied: "Well, I heard a conversation between Dr. Brown and Mr. Pifer in regard to it. A part of the conversation I did not get, but the end or finishing up of the talk, I heard. About the last thing I heard was: 'Go ahead and put in your ditch; put it down deep,'—about 4 feet it was, I think they said; 'to be careful and fill the earth back so it will not injure my garden.' That was about the amount of it." This witness also fixes the date of the conversation some time in December, 1894.

The plaintiff, F. C. Pifer, also testified in the cause that he went to Dr. Brown, and asked license or permission to put down a tiled drain through his (the defendant's) premises. After some conversation in regard to it, Dr. Brown gave him permission to put a drain through his premises, on condition that he would not disturb his garden (which is to say, in a way that would not interfere with his vegetables, growing or planted), or, further, that he should be allowed to tap and use the drain in case he himself should wish to drain his cellar, or in case of water-works in Buckhannon, and he should use the water privilege,—have the benefit of the drain to conduct away the waste water. This conversation occurred some time in December, 1894. Witness also states that he began the work of constructing said sewer on the 18th or 19th of January, 1895, and the tiling was laid some three or four days

afterwards, and as soon as it thawed sufficiently he replaced the dirt in a workmanlike manner; leaving on the surface the rich or dark soil, as agreed with Dr. Brown. In answer to another question, he says he received a letter from Dr. Brown, from Mt. Iron, St. Louis county, Minn., dated January 29, 1895, which was the only letter he had received from him since he left Buckhannon, a copy of which letter is filed with this deposition, and reads as follows: "Mt. Iron, St. Louis Co., Minnesota. Jan. 29th, 1895. F. C. Pifer, Esq.—Dear Sir: My wife informs me that you have taken the liberty to put a ditch through my premises, and that you said I had given you permission so to do. Under no consideration, and for no money, will I permit a ditch through my place, unless it be terra-cotta pipe 4 feet under ground, and have outlet clear beyond the premises,—I to be the judge how far beyond; and then only in consideration of \$50 to be paid to my wife on the acceptance of the contract by me. If this don't suit you, and you leave the ditch there, I will sue you in fifteen days from this date for damages. Very respectfully, Robert L. Brown." Said witness also identified the hand writing of said Robert L. Brown, and stated that he believed this letter to have been written by said Brown, and when asked in what direction would the surface water from his lot naturally flow, answered, "towards and through the defendant's lot." Said witness also states that there was a cellar under his building at the time he bought it, and, from its appearance, it has been built for a long time; it was drained by means of a wooden ditch or sewer towards the defendant's property, entering the defendant's property very near where the new ditch is located,—and further states that said new ditch had been in use about two weeks before it was disturbed.

The witness Spencer Boylen, in his deposition, states that the ditch, where it is dug, is the practical and natural drainage of said Pifer lot. He also states that, in constructing said ditch through the defendant's lot, the workmen cut the old sewer which had been used to drain the cellar under the old building about six or eight feet inside of Mrs. Brown's lot. The defendant Margaret N. Brown, in her deposition, says, when asked: "When, and under what circumstances, did you first learn that the plaintiff,

Mr. Pifer, was about to construct a ditch through your lot?" "I first learned this on the 21st day of January, 1895, when I saw Mr. Pifer with the surveyor, Mr. Mullins, running a line diagonally across my garden lot; and on the 22d day of January Mr. Pifer came to my door, and said to me: 'Mrs. Brown, I don't want you to think I am taking too much liberty in digging this ditch through your garden, but I spoke to Dr. Brown about it before he left home, and he said it was all right for me to do it, provided I left everything just as I found it; and, for fear he forgot or neglected to tell you, I thought best to come and say to you I was ready to begin it.' I replied, after some hesitancy: 'If you have permission from Dr. Brown to dig this ditch, and to leave everything as you find it, I suppose it is right for you to do it.'"

Now, the question of fact in regard to the understanding and agreement between the plaintiff and R. L. Brown as the agent of his wife, and also the question of fact as to the natural course of the drainage or flow of water from the plaintiff's lot, although there may be some conflict in the testimony with reference thereto, were passed upon by the court, which by its final decree found in favor of the plaintiff; and this Court has held in the case of *Smith v. Yoke*, 27 W. Va. 639 (first point of syllabus), that: "Where the decree sought to be reversed is based upon depositions which are so conflicting, and of such a doubtful and unsatisfactory character that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusion to be deduced therefrom, the Appellate Court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the Appellate Court might have pronounced a different decree if it had acted upon the cause in the first instance." And the same thing is held in the case of *Doonan v. Glynn*, 28 W. Va. 715; *Prichard v. Evans*, 31 W. Va. 137 (5 S. E. 461); *Bartlett v. Clearinger*, 35 W. Va. 720 (14 S. E. 273). Now, the court below found the fact that Robert L. Brown, acting as the agent of his wife, consented to the construction of this sewer under the lot which belonged to his wife; the appellant, Margaret N. Brown, at the time the appellee was about proceeding to open the ditch through her lot for the

purpose of laying down the tile, having, as she states in her testimony, told the appellee that if he had permission from Dr. Brown to dig this ditch, and to leave everything as he found it, she supposed it was right for him to do so. The evidence shows that he did have permission from Dr. Brown, and it also shows that the work was done in the manner that Dr. Brown said it must be done, in the letter written to the appellee from Minnesota, dated January 29, 1895. And the evidence clearly showing, if the witnesses who were examined are to be regarded as entitled to equal credibility, that the plaintiff, Pifer, had a verbal permission from the defendant Brown to construct this underground drain through and under the lot belonging to his wife in the manner he did, it is clear that the plaintiff made no misrepresentation and practiced no fraud upon the defendant Margaret N. Brown in the absence of her husband. And the evidence further shows that said R. L. Brown acted as the agent of his wife in matters of this character, and it appears from her own testimony that she was willing to submit to his judgment, defer to his opinion, and abide by the agreement made by him in the matter. At any rate, she so expressed herself when approached by the plaintiff on the day he was about proceeding to open the ditch. We must therefore say that the court committed no error in finding that a parol license was given to the plaintiff to construct said underground drain through and under the defendant's lot, and that in pursuance of said license, and in accordance with its terms, said underground drain was constructed. The question, then, presented by the record, is whether such license, after it has been acted upon and executed, can be revoked at the will of the licensor. Upon this question the authorities are conflicting, and the question is, to some extent, dependent upon the circumstances surrounding each particular case. The defendant Margaret N. Brown was present and saw this work progressing when the plaintiff proceeded to dig the ditch, and the only restriction she placed upon her unqualified consent to the work being done as the plaintiff proposed was that it should have been authorized by her husband. That it was so authorized, we must say that the circuit court was fully warranted in finding from the testimony.

This brings us to the question as to the legal effect of a parol license of this character. Will a court of equity allow it to be revoked, at the pleasure of the licensor, after money has been expended and the work completed in pursuance of the license, before the licensee has had any opportunity to derive any benefit from his expenditure and labor? Under the head of "Rights by License," Chancellor Kent says, in volume 3, page 452: "The law is solicitous to prevent all kinds of imposition and injury from confidence reposed in the acts of others, and a parol license to do an act on one's own land affecting injuriously the air and light of a neighbor's house is held not to be revocable by such neighbor after it has been once acted upon, and expense incurred. Such a license is a direct encouragement to expend money, and it would be against conscience to revoke it as soon as the expenditure begins to be beneficial. The contract would be specifically enforced in equity. Such a parol license to enjoy a beneficial privilege is not an interest in land, within the statute of frauds." Authorities not wanting in respectability may be found on both sides of this question. So, in the case of *Le Ferre v. Le Ferre*, 4 Serg. & R. 241, cited in Washb. Easem. p. 441, the facts were as follows: The owner of a parcel of land sold a part of it to the owner of a tanyard, together with a right to draw water by pipes laid in the earth along a designated line through the vendor's land from a stream on his land to the vendee's tanyard. After these pipes had been laid and used for a considerable time, it was orally agreed between the parties that they should be taken up and laid in another place than the line indicated by the deed, which was accordingly done by the vendee at his expense. After lying in this situation for six or seven years in connection with the business of the tanyard, the owner of the latter sold the same, with the water right which he had purchased, to the present plaintiff. Soon after this the original vendor cut off the pipes within his own land, and stopped the flow of water therein to his tanyard, and and for this the plaintiff brought his action.

The court held: That, as the pipe was laid in the manner indicated by the owner of the land at the the expense of the owner of the tanyard, a court of equity would treat the latter as owning the right to maintain it there—First, by

having incurred expense in laying it down under an agreement with the landowner that he should have such right; and, second, by his being in possession. That the court would require the landowner to execute this agreement on his part, and would have granted an injunction to prevent the landowner from prosecuting a suit at law for laying down the pipe, and that courts of law would not suffer him, under these circumstances, to take the law into his own hands, by cutting or destroying the aqueduct. To the suggestion that the laying down of the pipe was done by a parol license only, which was revocable, the court held that after being executed, and expense thereby incurred by the licensee, it could not be revoked, so as to make the licensee a wrongdoer. This case, it is believed, states the doctrine on this subject in Pennsylvania, and several other cases might be cited in that state announcing the same doctrine. This ruling has been followed and announced in several of our states. So in the case of *Wharton v. Steens*, 84 Iowa, 107 (50 N. W. 562), it was held that: "If surface water flows by a well-defined channel, be it in a ditch, or swale in its primitive condition, and seeks to discharge in a neighboring stream, its flow cannot be retarded or interfered with by a landowner to the injury of neighboring proprietors. Mandatory injunctions may issue to compel the removal of obstructions placed in a ditch so as to retard the flow of the water as it was before such obstructions were built." So, also, in the case of *Metcalf v. Hart*, 3 Wyo. 513 (27 Pac. 900), and (31 Pac. 407), it is held that: "When, by authority of a parol license, the licensee has been put in possession, and induced to place valuable improvements on the land, of which he would be defrauded and robbed by the revocation of the license, equity will interpose, and either forbid the licensor to revoke the license, or impose terms such as will avoid fraud and accomplish what justice and good conscience demand." Again, in the case of *Wickersham v. Orr*, 9 Iowa 254, it was held that: "When a portion of a partition wall has been erected upon a lot under and by virtue of a license from the owner thereof, such license cannot be revoked, either by the licensor or his grantee with notice." In the case of *Rhodes v. Otis*, 33 Ala. 578, the court held that: "A parol license to float spars down a private stream, ob-

tained for valuable consideration, cannot be revoked by the grantor when the grantee, having acted upon it, would be injured by the revocation. The doctrine of estoppel *in pais* applies to such a case." So, again, in the case of *Cook v. Pridgen*, 45 Ga. 331, it was held that: "A parol license to one to enjoy a permanent easement upon the land of another (as to back water upon it) is an interest in the land, and must be in writing, by the statute of frauds, and is void in law." But if the licensee in pursuance of the license goes forward, and for the enjoyment of the easement makes large investments, and the easement be one in its nature permanent, equity will decree a specific performance as in other cases of a part performance by one party of a parol contract for a sale of lands. To the same effect, see *Beatty v. Gregory*, 17 Iowa, 109. On this same subject, Rice, in his valuable work on the Modern Law of Real Property (page 511), says: "Where a parol license has been executed and acted upon, and expenses incurred in perfecting an easement over the land of another in reliance upon the parol license previously granted, it cannot afterwards be revoked without placing the licensee in *statu quo*. [Citing *Woodbury v. Parshley*, 7 N. H. 237.] In such cases, equity holds that, for remedial purposes, the license shall be deemed an executed contract. [Citing *Snorden v. Wylas*, 19 Ind. 14; *Beatty v. Gregory*, 17 Iowa 114, *supra*; *Dempsey v. Kip*, 61 N. Y. 462; *Lacy v. Arnett*, 33 Pa. St. 169; *Meek v. Breckenridge*, 29 Ohio St. 642.]

* * * It is now well settled in this country that, as between private person, a parol license, though primarily revocable, is not so when the licensee has executed it, and in so doing has incurred expense. This doctrine was announced as far back as 3 Ga. 82 in *Sheffield v. Collier*, and again in *City of Macon v. Franklin*, 12 Ga. 239, in which Judge Nisbet said: "The rule is, as stated, that a parol license is revocable; but it has some exceptions. If the enjoyment of it must be preceded necessarily by the expenditure of money, and the grantee has made improvements or invested capital in consequence of it, it becomes an agreement for a valuable consideration, and he is a purchaser for value." Citing *Winham v. McGuire*, 51 Ga. 578, and *Railroad Co. v. Mitchell*, 69 Ga. 114. On the next page the author says the distinction between an

easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis."

On the other hand we find numerous authorities which hold that a mere parol license of this character is revocable at the will of the licensor. Cooley, Torts (2d Ed.) 360, says, after speaking of a license to erect a building on the land of another, and the right, to remove the same: "But a license can not be coupled with an interest in the lands, unless created by deed, or by such other instrument as is sufficient to convey such an interest under the statute of frauds. Therefore rights of way, sales of growing trees, permission to flow lands permanently, or to carry water over or pipes under the land of another, are mere licenses, and revocable as such, unless created or made by deed." Citing the case of *Wiseman v. Luckinger*, 84 N. Y. 31, where it is held that: "A mere license to drain is not made irrevocable by the fact that a valuable consideration was paid therefor, and that a right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such land which can not be conferred by parol license. It can only be granted by deed or conveyance in writing." Danforth, Judge, in delivering the opinion of the court, says: "A right awarded to the plaintiff to have his drain pass through the defendant's land is, in the terms of the judgment, an easement, and, for its enjoyment, requires that the plaintiff shall have an interest in the defendant's land." Citing *Heurlins v. Shippam*, 5 Barn. & C. 221. The question was whether a right to a drain running through the adjoining lands could be conferred by parol license, and, after the fullest examination, it was decided that it could not; also citing *Cocker v. Corper*, 1 Cramp. M. & R. 418,—a similar case. The plaintiff therein sued for the obstruction of a drain which had been originally constructed at his expense on the defendant's land by his consent, verbally given. After it had been enjoyed for eighteen years the defendant obstructed it, and it was contended by the plaintiff that the license, having been acted upon, could not be revoked. But the court held that *Heurlins v. Shippam* was decisive to show that such an easement can not be conferred except by deed. And the same, in substance, is held in *Cronkhite v. Cronkhite*, 94 N. Y. 323. In that case water had

been carried in pipes across a tract of land under a parol license for forty years, and, although a consideration was paid, it was held to be revocable at the pleasure of the licensor or his successor in interest. See, also, *Wilkins v. Irvine*, 33 Ohio St. 138, upon the same question, where it was held that: "A written license, not under seal, to enter upon and imbed water pipes in the land of another, with privilege to enter and repair them, created no interest in or incumbrance upon the land, such as would disable the owner thereof from making a good and sufficient deed conveying a good title thereto." So, also, in the case of *Owen v. Field*, 12 Allen, 457, it was held that: "An owner of land may at any time revoke his oral license to lay an aqueduct through the same; and, after doing so, he will not be restrained in equity from cutting off the aqueduct." Wood, in his valuable work on the Statute of Frauds (page 28, § 10), thus propounds the law on this question: "There are few instances in which a parol license to do acts upon the land of another is not revocable. In some of the states, as we have seen, it is held that a parol license which is executed, and has involved the expenditure of large sums of money, is not revocable, upon the ground that the party giving it is estopped from revoking it. But this doctrine seems to us to be in defiance of the statute, and to operate as a complete abrogation of its salutary provision in respect to the transfer of interests in land, and is an instance of judicial legislation which is wholly unwarranted. If a person, in view of the statute in this regard, of which he is presumed to have knowledge, sees fit to go on and make extensive and permanent improvements upon the lands of another without first investing himself with a legal right to enjoy them, it is difficult to see on what ground a court of equity should interfere to protect him against the consequences of his folly, or why the owner of the land, who has merely consented to such erections or improvements, should have his estate thus burdened with a permanent easement, and be equitably estopped from revoking this authority and ridding his premises of a burden which the statute provides shall only be imposed in a certain mode."

Angell on Water Courses (page 322, § 169) says: "The case of *Fentiman v. Smith* (4 East, 107) is clear and pos-

itive in its language. The plaintiff in that case claimed to have a passage for water by a tunnel over the defendant's land, and Lord Ellenborough lays it down distinctly: 'The title to have the water flowing in the tunnel over defendant's land could not pass by parol license without deed, and the plaintiff could not be entitled to it, as stated in his declaration, by reason of his possession of the mill; but he had it by license of the defendant, or by contract with him, and, if by license, it was revocable at any time.''' Washburn, in his work on Easements and Servitudes, on page 431, § 14, says: "It should, however be stated that, as understood in England and most of the states, a parol license to construct a water course in one's land is revocable, and no title is thereby gained, either to the land, or to any right to maintain the water course. An enjoyment under such a license would neither be by grant nor adverse user." Washburn on Real Property (volume 1, p. 632, § 10) says: "Another class of cases where the license may be revoked is where the act licensed to be done is to be done upon the land of the licensor, and, if granted by deed, would amount to an easement therein. If such license be by parol, it may be revoked, as to any act thereafter to be done, even though, in order to enjoy it, the licensee may have incurred expenses upon the premises of the licensor. Thus, where A., by B.'s license, laid an aqueduct across B.'s land, who then revoked it and cut off the pipe that conducted the water, the court, as a court of equity, refused to interfere, because B. had a right to revoke the license at his pleasure." The law on this question is also stated in the sixth volume of the American & English Encyclopedia of Law (page 18), under the head of "Easements": "The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands, and cannot be conferred except by deed or conveyance in writing. It cannot be conferred by parol license, and a license to lay a drain does not vest any title or give any irrevocable easement in the land, even though a consideration is paid for the same. It is revocable at any time, even after twenty years' user; for, the use being by consent of the landowner, no prescriptive right is gained."

Now, while I find it extremely difficult to reconcile the

conflict in authorities upon this question, which, as we have seen, is not influenced or controlled by the uniformly accepted and well-established rulings in regard to part performance or executed contracts, and the influence thereof in withdrawing the agreement from the effect of the statute of frauds, and which is not to be determined or settled in accordance with the usual presumption arising from possession, user, and the lapse of time, I am led reluctantly, under the peculiar facts of the case, to the conclusion, from the best examinations I have been able to make of the authorities at my command, that a mere oral license to construct an underground drain by one lot owner in a town to a neighboring lot owner, for the purpose of draining the lot of the licensee, although executed and in full use and enjoyment, is revocable at the pleasure of the licensor, and that the fact of entire performance of the contract, even though with full consideration, will not entitle the licensee to the permanent use of the drain. This question is to some extent a new one in this State, and we are compelled to go beyond our borders, and examine the English and American authorities upon the subject, and in so doing have found an almost irreconcilable conflict in the rulings of the courts upon almost precisely the same state of facts; and the difficulty in arriving at the true state of facts from conflicting testimony, united with the feeling that is so frequently engendered by claims of this character, affords cogent arguments in favor of the conclusion that rights of this character should be conferred by deed, and that they should not depend for their validity upon the slippery memory of man, even where he is disposed to be fair and honest. My conclusion, therefore, is that the decree complained of must be reversed, with costs.

Reversed.

CHARLESTON.

TRIPLETT v. LAKE *et ux.*(DENT, JUDGE, *absent.*)

Submitted February 3, 1897—Decided April 21, 1897.

1. VENDOR'S LIEN—*Deed—Interest.*

In enforcing a vendor's lien for purchase money, the court, in rendering its decree, will ascertain the aggregate amount of principal and interest due on the notes executed for such purchase money, for which the vendor's lien is retained, to the date of the decree, and decree that interest be paid on such aggregate from the date of the decree. (p. 436.)

2. VENDOR'S LIEN—*Decree—Amendment of Decree.*

If the court, in enforcing such vendor's lien, aggregates the amount of principal and interest to the date of the decree, and then decrees that the defendants pay interest on such aggregate amount for several months prior to the date of the decree, this is such a mistake as may be safely amended on motion, under section 5 of chapter 134 of the Code, and which should be amended on motion to the circuit court. (p. 440.)

3. DECREE—*Appeal—Amendment after Appeal.*

If, after an appeal to this Court has been allowed, such decree be amended on motion in the circuit court, this Court will affirm the decree as amended. (p. 440.)

Appeal from Circuit Court, Taylor county.

Bill by Anthony Triplett, administrator of Washington A. Lake, against John M. Lake and Isabel Lake. Decree for plaintiff, and defendants appeal.

Affirmed.

J. H. HOLT, for appellants.

W. R. D. DENT, for appellee.

ENGLISH, PRESIDENT:

This was a suit in equity instituted in the Circuit Court of Taylor county, at March rules, 1891, in which Anthony Triplett, administrator of Washington A. Lake, deceased, was plaintiff, and John M. Lake and Isabel Lake defendants. The complainant in his bill alleges that he is the administrator of the estate of Washington A. Lake, de-

ceased, and exhibits the order appointing him such administrator, and further alleges: That said decedent at the time of his death held the following notes against the following parties, to-wit: One note against the defendants, bearing date December 10, 1877, for three hundred and four dollars and fifty cents; one note against the defendants, bearing same date, for five hundred dollars; one note against defendants, bearing same date, for five hundred dollars; one note against defendants for five hundred dollars, same date; also, one note against the defendants, same date, for the sum of four hundred and ninety dollars. All of which notes bear interest from date, and were each signed by both of said defendants, and were for the balance of purchase money due on a certain tract of eighty-four acres of land conveyed by said Washington A. Lake and wife to said defendant Isabel Lake on the 10th day of December, 1877, by deed with covenants of general warranty, and to secure all which said notes a lien was expressly retained in said conveyance on said land (a copy of which deed is exhibited). That, in addition to the foregoing notes, said decedent held also the following notes, to-wit: One note against John M. Lake, defendant, dated the 29th day of April, 1874, for one hundred and fifty-five dollars and eighty cents, with interest from date; also, another note against J. M. Lake and certain sureties, to-wit, A. Armstrong and plaintiff, for eight hundred dollars, bearing date the 5th day of February, 1887, with interest from date; also, a certain note on Walter, Feltner & Co. for four hundred dollars, dated November 4, 1887, with interest from date; also, another note on Wesley Sinsel for one hundred and fifty dollars; also, a note for five hundred dollars signed by George H. Smith; and other notes, the amounts and makers of which are to the plaintiff unknown. That at the time of his death the decedent had all of said notes at the house of said defendants, who immediately wrongfully seized and took possession of the same, and refused to surrender them to the plaintiff or pay him the amount thereof, but illegally detain the same, in fraud of and in defiance of plaintiff's rights as such administrator. And plaintiff prays that said defendants be required to surrender and file all of said notes, and all other notes and papers belong-

ing to said decedent's estate, in the papers in this cause, and that the plaintiff may have a decree against the defendants for said purchase money, and that said land may be sold, and said purchase money and the costs of this suit may be paid, *etc.*

The defendants filed separate answers to said bill. Said J. M. Lake admits that on the 3d day of May, 1890, he came into possession, through his wife, Isabel Lake, of the following notes: Three notes of five hundred dollars each, and one note for four hundred and ninety dollars, which notes were part consideration for said eighty-four acres of land. But he denies that said three hundred and four dollars and fifty cent note mentioned in said bill was a part consideration for said land, or that any lien was retained for the same in the deed to said Isabel. That he never was in possession of said three hundred and four dollars and fifty cent note, but, by an agreement and contract hereinafter referred to, he is entitled to its possession. It is also true that he came into possession of said note of one hundred and fifty-five dollars and eighty cents dated April 29, 1874, and of the said note for eight hundred dollars, dated the 5th of February, 1887; but he denies that the plaintiff has any right to demand or have the possession of said notes, or any of them, for the reason that during his said father's lifetime, to-wit, on the 7th day of December, 1889, he and his said father had a settlement and a contract by which his said father agreed to deliver up to him and cancel all of said notes, and respondent, on his part, agreed to support his said father, and furnish him with medicine and such medical treatment as he might need during his life, and to execute his new note for one thousand dollars, and a deed of trust upon said eighty-four acres of land, in which trust his wife, Isabel Lake, was to join, to secure said notes. That the said contract was reduced to writing and signed by respondent and his said father, but was never in respondent's possession, and is not now, and he is unable, therefore, to exhibit it to the court. That respondent was always ready and willing to execute said note and trust as provided for in their said agreement, but before it was done his father (after going over all of their business relations in the past, and in order to make him equal with the other heirs, and in consideration of large

amounts of money advanced by respondent and paid to the credit of his said father), the said Washington, released him from the payment of said one thousand dollars, and on or about the 3d day of May, 1890, delivered up to respondent all of the aforesaid notes to be canceled; and that said notes have been destroyed, as is the custom of this respondent with such papers, except the three hundred and four dollars and fifty cent note, which was settled, but not delivered with the other notes, but which his said father promised to deliver, but never did. That he has no knowledge of said Walter, Feltner & Co. note for four hundred dollars, except that he was informed by his father in his lifetime that he intended to transfer it to said Isabel Lake, and he afterwards saw it in her possession; but respondent never at any time received said note. That he knows nothing of the Wesley Sinsel note for one hundred and fifty dollars, and does not believe any such note ever existed. He denies that he took into his possession the G. H. Smith note for five hundred dollars in favor of his father, and avers that it is in possession of the plaintiff, who has instituted proceedings to collect the same. And he denies that he seized illegally any of the papers or other property of his father.

Said Isabel Lake in her answer to said bill admits that on the 3d day of May, 1890, she came into possession of said three five hundred dollar notes, and the said four hundred and ninety dollar note, and the said eight hundred dollar note, by delivery of the same to her by the said Washington A. Lake in accordance with a contract made and entered into after a settlement between the said Washington and her said husband, John M. Lake; the said Washington directing her to destroy said notes at the time of their delivery, which she did by burning them. But by the provisions of said contract the said Washington was to deliver also the said note of three hundred and four dollars and fifty cents, but that said note was not delivered with the others; the said Washington promising to deliver it later, but he never did so. She denies that any lien was retained for the three hundred and four dollar and fifty cent note, or that it was a balance of purchase money for said eighty-four acre tract of land. She admits the possession of the Walter, Feltner & Co. note for

four hundred dollars, but claims it was regularly transferred to her by the said Washington Lake long before his death, in consideration of services rendered to him and kindness extended to him for a period of over twenty-five years; and she denies that the plaintiff has any right whatever to the possession of said notes, or any of them. She denies any knowledge of the one hundred and fifty dollar note referred to in the bill as the Wesley Sinsel note, or of the George H. Smith note for five hundred dollars, but says she is informed and believes that it is in the hands of plaintiff, who was carrying on legal proceedings at the time this suit was brought to collect the same. She denies that said Washington Lake at the time of his death had any of his notes or papers at her house, but avers that before his death took place, at the house of the plaintiff, the plaintiff demanded and took to his house every dollar's worth of property of every kind, that she had any knowledge of, belonging to the said Washington A. Lake. That she never visited plaintiff's house afterwards, and the charge that she wrongfully took any of the said property, notes, or otherwise, is false. That, by the provisions of said contract between the said John M. Lake and the said Washington A. Lake, the said John M. was to give his note for one thousand dollars, and a deed of trust was to be executed on said eighty-four acres of land, in which trust she was to join with her said husband, and it was agreed that the same was to be executed within thirty days. That she was always ready and willing to execute said deed on her part, and is still willing to do so, if it should appear to the court right and equitable for her to do so; but she says that, before said note was made or said deed prepared, the said Washington, in consideration of large amounts of money paid for and advanced to him by her said husband, released her said husband from the payment of the said one thousand dollars, and on or about the 3d day of May, 1890, delivered up to respondent all of the papers and notes he held against her and her said husband, except the said note of one hundred and fifty-five dollars and eighty-cents, which was settled and delivered to her said husband before, and the three hundred and four dollars and fifty cents, which was also settled in said contract, but which was not delivered; and she destroyed them as

aforesaid, believing them to be of no further use, *etc.*, in compliance with his directions.

To these answers the plaintiff replied generally. A large number of depositions were taken by both plaintiff and defendants, bearing principally upon the question of the mental capacity of said Washington A. Lake, and his ability to transact business, at the date of the agreement mentioned in the defendants' answers. On the 12th day of January, 1894, a decree was rendered in the cause, in which it was ascertained that the plaintiff had a vendor's lien against the property mentioned, which, with the interest aggregated thereon to the 12th day of January, 1894, the date of the decree, amounted to the sum of four thousand eight hundred and eighty-two dollars and seventy-five cents, and it was decreed that unless the defendant Isabel Lake, or some one for her, do pay said sum, with interest thereon from the 11th day of April, 1893, together with the costs of said suit, within thirty days from the rise of the court, a special commissioner therein appointed should sell the tract of land aforesaid upon the terms therein prescribed; and from this decree the defendant obtained this appeal.

Now, in determining the questions raised by this record, we may inquire, first, whether the allegations contained in the defendants' answers set forth such new matter as would constitute a claim for affirmative relief, which, if not controverted by a special reply in writing, should, for the purpose of the suit, be taken as true, and no proof thereof required. These answers deny that the note for three hundred and four dollars and fifty cents in the bill mentioned was part of the purchase money for said eighty-four acre tract of land, or that any vendor's lien was retained to secure the payment of the same, but they say that the three five hundred dollar notes (when they should have said "four," as there are four of them, and the word "three" is evidently used in both answers by mistake) and the four hundred and ninety dollar note were liens upon said eighty-four acres of land. The said defendants allege that on the 7th day of December, 1889, the said Washington A. Lake entered into a written contract with his son, J. M. Lake, whereby, in consideration of his said son furnishing him with a home and keeping and supporting him

during the remainder of his life, he released said J. M. Lake and Isabel Lake from the payment of said purchase money, with the exception of one thousand dollars, which was to be secured by a deed of trust upon the land. To these answers a general replication was filed, but this general replication would not be sufficient to put in issue these allegations, if they were such as entitled the defendants to affirmative relief; but, when we look to the substance of these answers, we can find in them nothing further than an alleged contract on the part of W. A. Lake to release the lien asserted in the bill in consideration of one thousand dollars to be secured by deed of trust upon the land, and other valuable considerations. This we can only regard as matter of defense to the lien sought to be enforced in the bill, and when such is the case the allegations of the answer which are relied on by way of defense to the allegations contained in the bill are put in issue by the general replication. So, in the case of *Foutty v. Poar*, 35 W. Va. 70 (12 S. E. 1096), this Court held that: "A claim for recoupment in an answer does not make such answer one setting up new matter calling for affirmative relief, and no special reply thereto is necessary; but such claim is only matter of defense to the bill, and is met by a general replication." In the case of *Cunningham v. Hedrick*, 23 W. Va. 579, it was held that: "Under the operation of sections 35 and 36 of chapter 125 of the Code, where the answer contains material allegations constituting a claim for affirmative relief, and no 'reply in writing' is filed, but a general replication, and the cause has been heard upon the pleadings thus made and the proofs taken, if the record shows that it is not such a case as would, before the passage of said sections, have made the filing of a cross bill necessary in order to entitle the defendant to the relief sought, the decree will not be reversed because no reply in writing was filed." This question was also before this Court in the case of *Smith v. Turley*, 32 W. Va. 14 (9 S. E. 46), in which it was held that: "An answer containing new matter calls for a reply in writing, under sections 35 and 36 of chapter 125 of the Code, only when such new matter, in its nature, as applied to the cause, calls for affirmative relief against some of the parties, and is not simply matter of defense of plaintiff's case; and it

may, by its matter, call for such reply only from certain of the parties, and not from others, and only as to part of its matter, and not as to the residue thereof." And again, in the case of *Moore v. Wheeler*, 10 W. Va. 35, it was held that: "An answer alleging new matter constituting a claim to affirmative relief in the suit, in the purview and meaning of the thirty-fifth section of chapter 125 of the Code, was intended simply to be allowed in lieu of a cross-bill in the cause as to such new matter, and not to make any other change in the practice as to the pleadings in courts of equity." It was not necessary, as we think, in the case under consideration, in the absence of said sections, to have filed a cross bill, in order to set up the contract (alleged in said answers) to release the vendor's lien sought to be enforced in the bill, but it was matter which could be set up by way of defense in the answer, and was properly put in issue by the general replication; and the court appears to have held (as we think, properly) that the defendants have failed to sustain the allegations of their answers by competent testimony, and has held that the plaintiff was entitled to the enforcement of the vendor's lien reserved on the face of said deed.

The court in this case proceeded to enforce the vendor's lien. The cause was not referred to a commissioner to ascertain the amount of the same, but the court found (by what process it is difficult to determine) that it aggregated, including principal and interest to the 12th day of January, 1894, the sum of four thousand eight hundred and eighty-two dollars and seventy-five cents. Now, if we omit from the calculation the note for three hundred and four dollars and fifty cents, which is alleged in the bill to constitute a part of said vendor's lien, but which is not mentioned in the deed as part of the purchase money, and for which no lien was retained, and also omit the note for two hundred and thirty-six dollars, which is mentioned in the deed, and to secure which a vendor's lien was retained, but which was not mentioned in the bill as being secured by a vendor's lien, the interest and principal would aggregate to the 12th day of January, 1894, four thousand eight hundred and ninety-three dollars and sixty-eight cents, instead of four thousand eight hundred and eighty-two dollars and seventy-five cents, as was ascertained by the court; and

while it is true that this is an inaccuracy of which the defendants could not complain, for the reason that the error was not to their prejudice, yet the court in its decree did, as we think, commit an error to the prejudice of the defendants, of which they complain, in this: that after finding the aggregate of the principal and interest of said purchase money to the 12th day of January, 1894, to be four thousand eight hundred and eighty-two dollars and seventy-five cents, the court decreed that unless the said Isabel Lake, or some one for her, do pay the said sum of four thousand eight hundred and eighty-two dollars and seventy-five cents, with interest from the 11th day of April, 1893, together with the costs of the suit, that a special commissioner therein named should sell after thirty days the property described in the bill, upon the terms set forth in said decree. It is provided by our statute (section 16 of chapter 131 of the Code) that: "In all cases where a judgment or decree is rendered or made for the payment of money, it shall be for the aggregate of principal and interest due at the date of the verdict if there be one, otherwise at the date of the judgment or decree, with interest thereon from such date except in cases where it is otherwise provided." So in the case of *Harker v. Railroad Co.*, 15 W. Va., 644, GREEN, PRESIDENT, delivering the opinion of the Court, said: "The court erred in giving judgment for interest on damages found by the jury prior to the day the judgment was actually entered; that is, the 7th day of May, 1878. The judgment entered by the circuit court erroneously gave interest from the first day of the term at which the judgment was entered; that is, from April 18, 1878." Again, in the case of *Lamb v. Cecil*, 25 W. Va. 288, JOHNSON, PRESIDENT, in the opinion of the Court, says: "It was error to decree interest on the aggregate of principal and interest from a time anterior to the rendition of the decree,"—citing *Fowler v. Railroad Co.*, 18 W. Va. 579. He adds that, while this error would require the decree to be corrected, yet, as the difference is not sufficient to give this Court jurisdiction, it would, if there were no other error, be reversed, with costs to the appellee, and a decree entered for the correct amount; citing *Bee v. Burdett*, 23 W. Va., 744, which was a suit to enforce a vendor's lien, and in which it was held "that in

a controversy merely pecuniary, where the alleged errors against the appellant exceed one hundred dollars, but this Court finds an error of less than one hundred dollars, if such error be merely clerical this Court will correct and affirm the decree, but, if it be judicial, the decree will be reversed, with costs to the appellee in either event." In the case we are considering, however, the decree was for interest on the sum of four thousand eight hundred and eighty-two dollars and seventy-five cents for nine months and one day previous to the date of the decree, which would amount to a little more than two hundred and twenty dollars; and this is not a mere clerical error, but is a judicial error. The nine months having already elapsed at the date of the decree, a decree was entered for something over two hundred and twenty dollars more than the plaintiff was entitled to, if the court had been correct in finding four thousand eight hundred and eighty-two dollars and seventy-five cents to be the aggregate amount to which the plaintiff was entitled. In the case of *Payne v. Webb*, 28 W. Va. 558, which was a suit brought to enforce a vendor's lien, this Court held: "It is the duty of the court, before it decrees a sale of land, to fix definitely both the amounts and priorities of the liens on it, and the failure to do either will be ground for the reversal of the decree." Now, if we were to proceed to correct this decree as to the amount of the lien the plaintiff was entitled to enforce against the land in the bill mentioned, we would look first at the allegations of the bill, and would there find among the other notes a note for three hundred and four dollars and fifty cents dated December 10, 1877, which, with interest added to the date of the decree, would amount to a little over six hundred dollars, which is alleged to be for part of the purchase money and a lien on the land, which allegation, however, is denied by the answers; and the only proof of the notes constituting a vendor's lien on said land is the deed exhibited with the bill, which mentions and describes no such note as the three hundred and four dollars and fifty cents, but does describe a note for two hundred and thirty-six dollars, dated December 10, 1877, and payable on or before the 10th of December, 1878, which note, with sixteen years and one month interest added, would amount to nearly four hundred and seventy-

five dollars. Yet both of these notes appear to have been omitted in making the calculation and ascertaining the aggregate on which to base the decree, and while the defendants can not complain that these notes, or either of them, have been omitted from the calculation, they can complain that nine months' illegal interest, amounting to two hundred and twenty dollars and fifty-four cents, has been added to an aggregate improperly ascertained, and that their land has been decreed to be sold for the aggregate so improperly ascertained, with said illegal interest added. This was not a clerical error such as could have been corrected under the statute on motion, but was a judicial error, for which the cause must be reversed and remanded, with costs to the appellants.

ON REHEARING.

This case was before this Court and was submitted on the 11th of September, 1895: an opinion therein having been handed down on the 24th day of January, 1896. A rehearing was applied for and allowed on the 1st day of February, 1896. The cause was reargued and resubmitted on February 3, 1897. The sole ground upon which the opinion was based, reversing the decree in the original cause, was that the decree complained of, after aggregating the principal and interest due upon the claim asserted in the bill, gave interest thereon for a period nine months and one day anterior to the date of the decree, which interest amounted to a little more than two hundred and twenty dollars. This was held to be a judicial error, and the decree complained of was on this account reversed. Since said opinion was handed down, to wit, on the 18th of July, 1896, the plaintiff, after giving proper notice, moved the circuit court of Taylor county to correct said decree under the provision of chapter 134 of the Code, which motion was sustained, and which decree was corrected so as to give interest on the aggregate amount of the principal and interest due on the claim asserted in the bill from the date of said decree. The decree having been corrected as above stated, the question submitted for our consideration is whether it was such an error as could have been corrected on motion by the same court, and was properly corrected by the circuit court.

At the time the opinion in this cause was handed down, I was of opinion that this error was a judicial one, and not a clerical error which could have been corrected under any of the sections of chapter 134 of the Code; but, upon a closer examination of the provisions of the statute and the authorities relied upon in the petition filed for the rehearing of this cause, my conclusion is that I was mistaken in holding the error upon which the opinion was based to have been a judicial one, and not a clerical error such as could have been corrected on motion, under the statute. Having arrived at this conclusion, the question is what effect the correction of the judgment by the circuit court after the rehearing was allowed in this case should have upon the decree now to be entered therein. In determining this question, we look first to see whether the appellants at the time the appeal was applied for were in a condition to ask this Court for a reversal of the decree complained of. If the only error appearing on the face of the record was such as could have been corrected in the circuit court, should their appeal have been entertained? In reply to this question, section 6, chapter 134, of the Code, provides that: "No appeal, writ of error or supersedeas shall be allowed or entertained by an appellate court or judge for any matter for which a judgment or decree is liable to be reversed or amended on motion as aforesaid by the court which rendered it or the judge thereof until such motion be made and overruled in whole or in part. And when an appellate court hears a case wherein an appeal, writ of error or supersedeas has been allowed, if it appear that, either before or since the same was allowed the judgment or decree has been so amended, the appellate court shall affirm the judgment or decree unless there be other error." Under section 5 of the same chapter, it is provided that: "The court in which is rendered a judgment or decree in a cause wherein there is in a declaration or pleading or in the record of the judgment or decree any mistake, miscalculation, or misrecital of any name, sum, quantity or time, when the same is right in any part of the record or proceedings * * * whereby such judgment or decree may be safely amended, the judge thereof may on motion of any party amend such judgment or decree according to the truth and justice of the case after reasonable notice to

the opposite party." Having concluded that the error complained of upon which the opinion in this case was based was not a judicial error, but a clerical error, the appellants should have applied to the circuit court, under chapter 134 of the Code, to correct the same, instead of bringing the case here by appeal. This was a controversy merely pecuniary, and, upon the question presented by the record, we find that this Court has held in the case of *Conner v. Fleshman*, 4 W. Va. 693 (point 5 of the syllabus), that: "A judgment rendered in June, 1870, which provides for the recovery of interest from 1866, which is held to be erroneous under sections 14 and 16, chapter 131, p. 627, of the Code; but such error can be corrected in the court below, by section 5, chapter 134, and in this Court, by section 6 of the same chapter, and it was accordingly corrected." Also, in the case of *Bee v. Burdett*, 23 W. Va. 744 (second point of syllabus), it was held that: "In a controversy merely pecuniary, where the alleged errors against the appellant exceed \$100, but this Court finds an error of less than \$100, if such error be merely clerical this Court will correct and confirm the decree; but, if it be judicial, the decree will be reversed, with costs to the appellee in either event." Again, in the case of *Lamb v. Cecil*, 25 W. Va. 288 (first point of syllabus), it was held that: "While it was error to give interest upon the aggregate of principal and interest from a time anterior to the decree, yet if the difference in amount is less than \$100, and that is the only error appearing by the record, the decree will be reversed, with costs to the appellee, and a decree will be entered for the proper amount." In the case we are now considering the mistake was one which might have been easily corrected by reference to other portions of the record, as has been shown by the subsequent action of the circuit court in correcting the same. This correction might have been made on motion by the appellants before bringing the case here, and having failed to move in the circuit court to correct said clerical error, and the same having been subsequently corrected on motion of the appellee, the decree as corrected is affirmed, with costs to the appellee.

Affirmed.

CHARLESTON.

BARNETT v. BOONE LUMBER Co.

43	441
43	482
43	441
60	326

Submitted January 19, 1897—Decided April 24, 1897.

1. ORDER—*Acceptance—Statute of Frauds.*

An unconditional verbal promise to pay a written order is an acceptance of such order, and, if founded on a sufficient legal consideration, is binding on the acceptor. The debt, default, or misdoing of another is not a sufficient consideration to exempt such promise from the operation of the statute of frauds. (p. 444.)

2. INSTRUCTIONS—*Erroneous Instructions—Reversal.*

Where the instructions given in behalf of plaintiff are erroneous, and contradictory to instructions given in behalf of defendant, judgment in favor of plaintiff will be reversed. (p. 445.)

Error to Circuit Court, Kanawha county.

Action by J. H. Barnett against the Boone Lumber Company. Judgment for plaintiff and defendant brings error.

Reversed.

WILSON & PAYNE and S. S. GREEN, for plaintiff in error.

SIMMS & ENSLOW and HERBERT FITZPATRICK, for defendant in error.

DENT, JUDGE :

The Boone Lumber Company complains of a judgment of the Circuit Court of Kanawha county, rendered against it on the 5th day of April, 1895, in favor of J. H. Barnett, for the sum of one thousand one hundred and thirty-two dollars. The following is a statement of the case: "On the 3d of November, 1891, G. S. Scites and Isaac Plumley entered into a contract with the J. H. Millender Lumber Company for the sale of logs at that time on the A. M. Smith tract of land, lying on Cobb's creek. On the 20th of January following, Scites, having purchased Plumley's interest, was released from the agreement by the assumption of certain indebtedness, accompanied by a cash payment of \$500. Prior to the formation and release of this

contract in the fall of 1891, J. H. Barnett, the defendant in error, had been engaged in hauling this lumber from Plumley, working through the autumn months, but receiving virtually nothing. Early in January, 1892, Barnett entered the employ of Scites, and continued hauling until April, it being mutually agreed that the logs should be a pledge of payment for the labor. Upon the 4th of March, 1892, Scites contracted with the Lindsay-Cochran Manufacturing Company (later the Boone Lumber Company, the plaintiff in error) in regard to the logs hauled by Barnett, and then at the mouth of Cobb's creek awaiting a rise in the water, but bearing the mark 'J. B.' for future identification. It was claimed that the lumber company took the timber subject to existing liens, including the claim of Barnett. March 29th an order: 'March 29, 1892. Messrs. Lindsay-Cochran Co.: Please pay J. H. Barnett \$600.00 (six hundred dollars) for me, and this shall be your receipt for same, on timber. Yours, *etc.*, G. S. Scites,'—for \$600, was given Barnett by Scites upon the Lindsay-Cochran Company, promptly presented, and verbally accepted, either conditionally or unconditionally, but no payment was made. About the same time a flood tide had brought out part of the timber, and it was being measured and sawed at the mill of the plaintiff in error, though a large portion of it still remained upon the banks of Cobb's creek; and in April, 1892, the first lien upon it, held by the owners of the land from which it had been cut, was paid by the Boone Lumber Company. During this month the second order: 'April 22, 1892. Messrs. Lindsay-Cochran Co.: Please pay J. H. Barnett \$370.00, and charge the same to me. Yours, respectfully, G. S. Scites,'—drawn similarly to the former, in the sum of \$370, was given. As in the prior case, presentation was immediate, and acceptance verbal,—claimed by plaintiff, absolute; by defendant, conditional June 8, 1892, the benefit of the contracts of November 3, 1891, and January 20, 1892, was assigned to the Lindsay-Cochran Manufacturing Company, and 12 days later an order for \$6,500, drawn upon it March 29, 1891, in favor of Pritchard & Brubaker, was paid."

The court gave the following instructions to the jury in behalf of plaintiff: "The court instructs the jury that the

acceptance of a written order may be made verbally as well as by writing, and that a verbal acceptance of an order is binding on the acceptor." Instruction No. 2: "The court further instructs the jury that a verbal promise to pay an order, by the drawer thereof, at the time of presentation, is an acceptance of said order, and binds the drawer." And the following in behalf of defendant: Instruction No. 1: "The court instructs the jury that if they believe, from the evidence, that the Lindsay-Cochran Manufacturing Company accepted the orders described in the declaration verbally, in order to entitle the plaintiff to recover he must prove to their satisfaction that such verbal acceptance, so made, was such as to show clearly the intention on the part of said company to bind itself to the payment of the said orders at all events, and that, if the acceptance was equivocal, the plaintiff cannot recover." Instruction No. 2: "The court further instructs the jury that if they believe, from the evidence, that the defendant company, by its duly authorized agent, accepted the orders mentioned in the plaintiff's declaration upon the condition that said company would pay the said orders out of any moneys which it might owe G. S. Scites when the logs purchased by said company from said Scites were delivered according to contract, the plaintiff cannot recover until he proves that the defendant company does owe said Scites on said contract, and, if it does owe him, then only to the extent of said indebtedness." Instruction No. 12: "The court instructs the jury that the plaintiff did not have a lien upon the logs hauled by him at the time of the presentation of the orders of March 26, and April 22, 1894, if prior to such presentation he voluntarily parted with the possession of said logs, and turned them over to defendant's agents." Instruction No. 13: "The court instructs the jury that if they find, from the evidence, that the defendant, by its authorized agents, promised the plaintiff that it would pay the orders of March 26, and April 22, 1894, if there should be anything due G. S. Scites after the payment by defendant of other and prior claims, and they further find that, after the payment of such claims, there was nothing due said Scites, then they cannot find for the plaintiff because of such promise." Instruction No. 14: "The court instructs the jury that al-

though they shall find, from the evidence, that the defendant, by its authorized agent or agents, promised to pay the orders of March 26, and April 22, 1894, yet they cannot find for the plaintiff if, at the time of the presentation of said orders, and at the time of said promise, the defendant company was not indebted to G. S. Scites, and there was no consideration for the performance of said promise." Instruction No. 15: "The court instructs the jury that a promise to pay the debt of another cannot be enforced unless such promise was in writing, and if they find, from the evidence, that the defendant, by its authorized agents, promised to pay the orders of March 26, and April 22, 1894, and that said promise was merely for the payment of the debt of G. S. Scites, and without consideration, then they cannot find for the plaintiff because of such promise." The defendant also asked for nine other instructions, which were refused by the court.

As the instructions given fully and completely cover defendant's case, it is useless to cumber the record with those refused, as they cover the same grounds as those given, and some of them are plainly erroneous, and the court committed no substantial error in refusing them. The only question involved in this case is whether the defendant, by its duly authorized agents, accepted the orders in controversy in such manner as would make it legally liable to pay the same to the plaintiff. Such was the real issue between the parties. The acceptance was verbal, and if made without other consideration than the debt, default, or misdoing of another, it was void under the statute of frauds, and, if conditional, it would not be binding until the condition was fulfilled, even if on good consideration. *Gerow v. Riffe*, 29 W. Va. 462 (2 S. E. 104); 1 Am. & Eng. Enc. Law, 227; *Walton v. Mauderville*, 56 Iowa 597 (9 N. W. 913); *Browne*, St. Frauds, 174; 2 Rob. Prac. 152. Neither of the instructions given by plaintiff properly propounds the law. They are to the effect that the verbal acceptance of an order, without regard to the consideration, is valid and binding, which would amount to a nullification of the statute of frauds. They are abstract propositions of law, and virtually equivalent to instructing the jury "that, if they believe that the defendant verbally promised to pay the or-

ders in controversy, they must find for the plaintiff." An instruction in this form would be recognized at once as bad, for the reason that it ignores the fact that such promise is liable to be defeated for want of consideration, and that it might have been coupled with a condition. The defendant claimed that this was the case, yet these instructions wholly disregard such defense. The instructions could have been made good by adding thereto, "if such verbal promise was on a sufficient legal consideration," or "was not for the payment of the debt, default, or misdoing of another." It is true that the defendant's instructions are contradictory to, and thereby supply the defect in, the plaintiff's; but this does not cure the error, for the court cannot tell which set of instructions the jury followed in reaching their verdict. Presumably, however, they adhered to the erroneous instructions in behalf of plaintiff. In the case of *McMechen v. McMechen*, 17 W. Va. 703, this court held that "it is error to give inconsistent instructions to the jury, for it is calculated to confuse and mislead them. It leaves the jury at liberty to decide according to the correct rule of law, or the contrary, and renders it impossible for the court to determine upon what legal principles the verdict was founded." *McCreary's Adm'r v. Railroad Co.*, 43 W. Va. 110 (27 S. E. 327); *Woodsell v. Improvement Co.*, 38 W. Va. 23 (17 S. E. 386); *McKelvey v. Railroad Co.*, 35 W. Va. 500 (14 S. E. 261); *Hall v. Lyons*, 29 W. Va. 420 (1 S. E. 582); *Mason v. Bridge Co.*, 20 W. Va. 223.

The defendant's interrogatories are open to the same objection as the plaintiff's instructions. It may be true that the defendant was not indebted to G. S. Seites, the drawer of the order, and that there was no novation, or arrangement between the parties, by which the plaintiff was to release Seites and take the defendant for the amount of the orders; yet, if the plaintiff released a valid lien on the logs, and the defendant received the benefit of such release, such a consideration would be sufficient to make the verbal promise binding. *Gerow v. Riffe*, *supra*, and cases therein cited. The defendant objects to the testimony of Godfrey Seites in relation to the understanding between himself and the plaintiff as to his right to hold the logs until he was paid for the hauling. There certainly

can be no good reason why this evidence should not go to the jury, as one of the questions involved was as to whether the plaintiff had a lien on the logs. F. O. Ingraham's testimony is objected to for the same reason, and it does not appear that it was incompetent for a like purpose. The defendant was claiming under Scites, and took only such interest in the logs as he held. The testimony of Peter McClure, wherein he details a conversation had with Mr. Davidson, agent of defendant, to the effect that the agent said: "We are going to pay you and Mr. Pauley and Mr. Barnett. What more do you want?"—is incompetent to prove a binding promise. Yet it is proper to go to the jury, as tending to establish the admission of liability on a promise already made,—in other words, to fortify it as a promise made on sufficient consideration. Defendant further insists that it had the right to show by Benton Pauley in what manner it accepted his order, as tending to show, it must be presumed, that plaintiff's orders were accepted in the same manner. The counsel certainly know that such evidence is improper, as there may be reasons for accepting the one order that would not apply to the other, and *vice versa*. If defendant was not indebted to Godfrey Scites at the time the orders were presented, a verbal promise to pay or accept the same would not be binding, unless sustained by a sufficient legal consideration, and, if indebted, no promise would be necessary, as the orders to the extent thereof would operate as an assignment of such indebtedness on notice without acceptance. 2 Am. & Eng. Enc. Law (2d Ed.) 1059.

For the error committed in giving the plaintiff's instructions the judgment of the circuit court is reversed, the verdict of the jury set aside, and a new trial awarded.

Reversed.

CHARLESTON.

HOOPES v. DEVAUGHN *et al.*

Submitted February 4, 1897—Decided April 24, 1897.

1. FORGED DEED—*Cancellation—Equity Jurisdiction—Title.*

A suit in equity to annul a forged deed of land, and have it canceled, and the record of it declared void, brought by the legal owner of the land, who is the grantor named in the forged deed, or the party holding title from such grantor, who institutes suit to annul such forged deed while he is out of possession, is not taken out of equitable jurisdiction by the fact that the deed is void. It is not necessary, before bringing such suit, that the legal owner should establish his title and obtain possession of the land by ejectment at law. (p. 452.)

2. DEPOSITIONS—*Non-Resident Witness—Affidavit.*

The deposition of a non-resident witness, taken without the affidavit required by section 34 of chapter 130 of the Code, can be read upon the trial, if it appears from the depositions themselves that the witnesses were non-residents of the State at the time their depositions were taken. (p. 453.)

3. RETURN OF SHERIFF—*Amendment—Depositions.*

If a sheriff has made a return upon a notice to take depositions which, through inadvertence or mistake, is not in accordance with the facts, the court will be liberal in allowing him to amend his return, and when amended it will relate back to the date of the original return. (p. 455.)

Appeal from Circuit Court, Wood county.

Bill by Cyrus Hoopes against Nancy Devaughn and William Devaughn and others. Decree for plaintiff, and the Devaughns appeal.

Affirmed.

JAS. HUTCHINSON and V. B. ARCHER, for appellants.

DAVE D. JOHNSON, for appellee.

ENGLISH, PRESIDENT:

On the 1st Monday in October, 1891, Cyrus Hoopes filed his bill in the Circuit Court of Wood county, in which he represented that on February 14, 1865, George S. Riley and wife conveyed to one J. S. Plumley, of Chester County, Pa., a tract of land situated on Kite's Run, in said

43	447
44	694
43	447
48	277
43	447
53	217
53	219
43	447
56	586
43	447
59	430

county of Wood, containing one hundred and thirty-seven acres and ninety-eight poles, a certified copy of which deed was exhibited with his bill. The plaintiff further alleged that while said deed was made to J. S. Plumley, investing him with the legal title to said land, the equitable title was in the plaintiff, who was the legal owner thereof, said Plumley being his agent. Plaintiff further alleged that on the 11th of June, 1891, said Plumley conveyed said tract of land to plaintiff, which deeds were exhibited with the plaintiff's bill. The plaintiff further alleged that Nancy Devaughn conspired with her husband, William Devaughn, and caused a cloud to be put upon the plaintiff's title to said land; that he finds of record in the clerk's office of Wood county what purports to be a deed for said land from J. S. Plumley, of State of Ohio, Washington county, to Nancy Devaughn, purporting to convey said tract of one hundred and thirty-seven acres and ninety-eight poles of land, but that said pretended deed is fraudulent and void. Plaintiff further says that he had never seen said original deed of conveyance, but he is informed, believes, and so charges that said pretended deed was made, executed, and delivered for record by said William Devaughn, who forged the same; that the said William Devaughn, husband of said Nancy Devaughn, had said original deed prepared, and, with the same in his possession, went to the office of W. G. Bartholow, clerk of the court of common pleas, Washington County, Ohio, in the city of Marietta, and then and there, in the presence of said Bartholow, represented himself to be J. S. Plumley, and then and there signed the name of J. S. Plumley to said deed, and acknowledged the same as J. S. Plumley before said Bartholow; that said Devaughn afterwards delivered said forged and fraudulent deed to the clerk of Wood County, and had the same duly recorded, and received the same back from said clerk, since which time the plaintiff has not seen it, nor has he ever seen it, but the plaintiff says said pretended deed was forged and fraudulent, and passed no title to the said grantee therein; that said Plumley, to whom said land was conveyed, was then, and always has been since, a resident of Chester County, Pennsylvania, and that he never did execute, make, or deliver said deed, nor any deed, for said land to

said Nancy Devaughn, nor to any one other than the plaintiff, nor did he ever authorize any one else to do so. Plaintiff further alleges that said forged and fraudulent deed, recorded as aforesaid, is a cloud upon his title to said land, and he is advised that he has a right to come into a court of equity, to have said cloud removed, by having said forged and fraudulent deed declared fraudulent and void, and he exhibits a certified copy of the same. Plaintiff further says that said Nancy Devaughn has been attempting to take possession and control of said land under said fraudulent deed, and is even now pretending to be the owner thereof, and to exercise rights of ownership thereof. The plaintiff, therefore, prays that said Nancy Devaughn and William Devaughn, her husband, and the said J. S. Plumley, may be made parties defendant in this suit, and that they be required to answer the bill; that the said Nancy Devaughn and William Devaughn may be enjoined and restrained from exercising any control or acts of ownership over said land, or from in any wise interfering with the plaintiff's right and ownership thereof; that the said false and fraudulent paper, purporting to be a deed of conveyance from J. S. Plumley to Nancy Devaughn, dated the 16th of October, 1890, and recorded in Deed Book 67, p. 52, in the office of the clerk of the county court of Wood County, might be set aside, cancelled, and annulled, and declared fraudulent and void, and the cloud created thereby upon the plaintiff's title might be removed from the same, and for general relief.

The defendants Nancy Devaughn and William Devaughn filed their joint demurrer to the plaintiff's bill for want of equity therein. They also filed their joint answer to said bill, putting in issue the material allegations thereof. Said J. S. Plumley also filed his separate answer to said bill, admitting the material allegations thereof. Depositions were taken by both plaintiff and defendants, and on the 28th day of February, 1894, a decree was rendered in the cause granting leave to the plaintiff to have the sheriff to amend his return upon the notice to take the depositions of W. G. Bartholow and others attached to the deposition of said Bartholow filed in the cause as to the service thereof on the defendant Nancy Devaughn, by delivering a copy thereof to her husband, and by inserting in said re-

turn the words, "And explain the purport thereof to him"; and thereupon the said sheriff, in open court, made said amendment of said return.

The cause was heard upon the bill, answers, replications thereto, depositions taken in the cause, and upon exceptions indorsed upon the depositions of J. S. Plumley, Harvey Williamson, and Amos Williamson, taken on behalf of the plaintiff, and filed November 8, 1893; on consideration whereof the court overruled exceptions to the depositions of Harvey Williamson, and decreed that the plaintiff was entitled to the relief prayed for in the bill, and that the pretended deed purporting to have been made by J. S. Plumley to Nancy Devaughn, dated October 16, 1890, and recorded in Deed Book 67, p. 52, in the office of the county clerk of the county court of Wood County, was fraudulent and void, and was never executed by said J. S. Plumley, and that the plaintiff was entitled to have the same canceled, set aside, and annulled, and to have the cloud upon his title to the tract of land in the bill and proceedings created by said pretended deed removed, which was decreed accordingly; and from this decree William Devaughn and Nancy Devaughn applied for and obtained this appeal, assigning as the first error that the court erred in overruling their demurrer to plaintiff's bill, as there was no equity in it.

It is contended by counsel of appellants that a court of equity cannot afford the relief prayed for in this case upon the allegations contained in the bill, on the ground that it is not alleged that the plaintiff was in possession of the land in controversy, citing the case of *Christian v. Vance*, 41 W. Va. 754 (24 S. E. 596), in which it is held that a bill in chancery cannot be maintained by a person holding a deed for, but out of possession of, a certain tract of land to cancel as a cloud on his title the deed of another claimant (not a tax deed), who may be in possession of such land. Now, so far as the possession of said tract of land is concerned, while it is true that the bill does not affirmatively allege that the plaintiff is in possession thereof, yet he does allege that he holds a deed therefor which confers on him the fee-simple title thereto; and the bill further alleges that the defendant Nancy Devaughn has been attempting to take possession and control of said land under said

fraudulent deed, which allegation creates a strong inference that said Nancy Devaughn was not in possession of said land. This case, however, is not ruled by our decision in the case of *Christian v. Vance*, 41 W. Va. 754 (24 S. E. 596), but is distinguished therefrom for the reason that a cursory glance at the plaintiff's bill discloses the fact that the real object thereof is to set aside and annul the deed executed and acknowledged in Marietta, Ohio, for the reason that the same was a forgery, and for that reason was fraudulent and void. It may be that the [plaintiff in attaining this object will, as an incident thereto, remove a cloud from his title to said tract of land; but still there can be no question that equity has jurisdiction to set aside a deed which has been procured by fraud, and it is well settled that a court of equity, having obtained jurisdiction for one purpose, will go on and adjudicate the whole merits of the cause. So we find it stated by Story in his *Equity Jurisprudence* (section 456, vol. 1) as follows: "The doctrine now generally (perhaps not universally) held in America is (as we have seen) that in all cases where a court of equity has jurisdiction for discovery, and the discovery is effectual, that becomes a sufficient foundation upon which the court may proceed to grant full relief. In other words, where the court has legitimately acquired jurisdiction over the cause for the purpose of discovery it will, to prevent multiplicity of suits, entertain the suit also for relief." The same author in section 184, same volume, says: "Let us now pass to another great head of concurrent jurisdiction in equity, that of frauds. And here it may be laid down as a general rule, subject to few exceptions, that courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with and sometimes exclusive of other courts." And in section, 439 p. 440, same volume, the author says: "The beautiful character or prevailing excellence, if one may so say of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes. Thus (to present a summary of what has been already stated), if conveyances or other instruments are fraudulently or improperly obtained, they are decreed to be given up and canceled." The law on this question is also stated by Pom-

eroy in his work on Equity Jurisprudence (volume 1, § 181) as follows: "The concurrent jurisdiction of equity to grant remedies which are legal, in cases which might come within the cognizance of the law courts, is materially affected by the operation of two important principles, which are now merely stated, and which will be more fully discussed in a subsequent section. The first of these principles is that, when a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. For this reason, if the controversy contains any equitable feature, or requires any purely equitable relief, which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies, which would otherwise be beyond the scope of its authorities." This question was before this Court in the case of *Hall v. Wilkinson*, 35 W. Va. 167 (12 S. E. 1108), which was a suit brought for the purpose of setting up a lost instrument, and for other purposes, and it was there held (first point of syllabus) that "equity has jurisdiction wherever a lost instrument is to be set up, notwithstanding courts of law now exercise jurisdiction in the same case"; and (in second point of syllabus) "in such a case, a court of chancery having jurisdiction for one purpose will adjudicate the whole merits of the cause." So, also, in the case of *Bunce v. Gallagher*, 5 Blatchf. 581, (Fed. Cas. No. 2,133), it is held that "a suit in equity to annul a forged deed of land, and have it canceled, and the record of it declared void, brought by the legal owner of the land, who is the grantor named in the forged deed, while he is out of possession of the land, is not taken out of equitable jurisdiction by the fact that the deed is void. It is not necessary, before bringing such suit, that the legal owner should establish his title, and obtain possession of the land by ejectment at law." In the case of *De Camp v. Carnahan*, 26 W. Va. 839, this Court held that "a court of equity has a right to cancel a deed which is a cloud upon the title of one out of possession of the land." On this point see, also,

Bushnell v. Hartford, 4 Johns. Ch. 301, and *Paper Co. v. O'Dougherty*, 81 N. Y. 474. In view of these authorities, I conclude that the court committed no error in overruling the demurrer to the plaintiff's bill for want of equity.

The second error relied on by the appellants pertains to the action of the court in overruling the exceptions to the depositions taken in behalf of the plaintiff on account of the failure to file the proper affidavits as to the non-residence of the witnesses as provided by statute, and because of the insufficiency of the several notices to take such deposition, they not having been served within a reasonable time, as required by law, and also the deposition of the party in interest without reasonable and proper notice, and without an express order of the court, and was therefore a nullity, and could not be the basis of legal and proper evidence. The question raised by this assignment of error appears to have been definitely settled by this Court by the case of *Abbott v. L'Hommedieu*, 10 W. Va. 677 (first point of syllabus), where it is held that "the true purpose and intent of the thirty-fourth section of chapter 130 of the Code of 1868, in providing for an affidavit, is complied with, if it appears by the deposition of the witness whose deposition was taken, or other evidence, that the witness whose deposition was taken resided out of the State or was out of it in the service of the State," *etc.*, "at the time the deposition was taken." The section of the statute referred to in this decision is section 34 of chapter 130 of the Code of 1868, and is also found in section 34 of chapter 130 of Code of 1891, and provides that on affidavit that a witness resides out of the State, or is out of it in the service thereof or of the United States, his deposition may be taken, *etc.*; and as we have seen in the case of *Abbott v. L'Hommedieu*, *supra*, such affidavit is unnecessary if it appears by the deposition of the witness or by other evidence that such witness resided out of the State; and it clearly appears from the depositions that each of these witnesses was a non-resident of this State at the time his deposition was taken, and it also appears that said J. S. Plumley, whose deposition was taken in the case, was a nonresident of this State at the time by his sworn answer in the cause. There is therefore nothing in the exception based on the fact that no affidavit was made

before said depositions were taken, and the notices to take such depositions appear to have been given a reasonable time before the same were taken.

It is further claimed to be error in the court to have allowed the depositions of J. S. Plumley and Robert B. Plumley to be retaken after exceptions had been sustained to their depositions. This, however, we regard as in accordance with the rules of practice; and this Court held in the case of *Vance v. Snyder*, 6 W. Va. 26 (fourth point of syllabus,) that "it is not error in a court of equity to give a party leave to retake depositions which the court upon an exception determines cannot be read, for want of sufficient notice, at the term at which it is so determined." Barton, in his *Chancery Practice* (section 297), says: "The general rule is that without the leave of the court, and for good cause, a deposition once taken in a case can not be retaken, the object being to compel a full disclosure on the side before the other side proves his case, and to prevent the temptation to perjury that would be offered by giving opportunity to change the evidence to suit the emergencies of the case. But the courts possess much latitude in permitting a second examination; and, where the circumstances of the case and justice require it, an order for the second examination of the same witness will be made, which, unless it was palpably improper to grant, an appellate court will not for this cause reverse the decree, citing *Fant v. Miller*, 17 Grat. 188. In accord with these views, it has been held not to be error to allow depositions to be taken which the court, upon exception, determines can not be read for want of sufficient notice, the order to retake being made at the term at which the matter was determined."

The fourth assignment of error relied upon by the appellants is claimed to have been as to the action of the court in allowing the sheriff to amend his return of the service of the notice to take the deposition of W. G. Bartholow, after the deposition had been taken upon an irregular and insufficient notice. Upon this question Barton, in his *Law Practice* (volume 2, p. 1087), says: "When a false return has been made by a mistake, the courts are liberal in allowing officers to amend their returns, and this has been permitted after notice of a motion against the sheriff

founded on the original return." See 2 Tuck. Bl. Comm. p. 371; also 1 Bart. Law Prac. p. 275, § 88, where it is said: "After service is once made, there can be, of course, no amendment of the facts of service, but if what has been done has been incorrectly stated in the return, or if all has not been stated that ought to be, the law is liberal in allowing the return to be amended so as to conform to the facts." And again, in the case of *Capehart v. Cunningham*, 12 W. Va. 750, it was held that it is not error for the court to permit the sheriff to amend his return upon a summons, even at the hearing of the motion to reverse the judgment, and such amended return relates back to and takes the place of the original return. We therefore hold that the circuit court committed no error in allowing the sheriff to amend his return on the notice to take the deposition of W. G. Bartholow in this case.

This disposes of the errors formally relied upon, with the exception of the fifth one, which claims that the decree was contrary to the weight of the evidence and the justice and equities of the cause as established by the proof, which final assignment brings us to the consideration of the merits of the cause, and upon an examination of the testimony it is clear to me that the circuit court committed no error in reaching the conclusion it did upon the facts proven. The witness W. G. Bartholow in his deposition positively identifies the defendant William Devaughn as the man who came to his office in the city of Marietta, and acknowledged the deed which the plaintiff is seeking to have canceled and set aside as fraudulent and void. He further says that this man Devaughn came to his office in the court house in the city of Marietta, Ohio, representing himself to be J. S. Plumley, and presented the deed and acknowledged the same before him as clerk of the court of common pleas, and he certified the acknowledgment on that date under the seal of said court; and he further states that Exhibit B., in the record, appears to be a copy of said original deed. This was on the 18th day of October, 1890. That he saw him again in June, 1891, on the streets in Parkersburg, W. Va., and recognized him as being the same man who acknowledged the deed before him in October, 1890, and then learned that his name was William Devaughn. Again, in September, 1891,

during the session of the criminal court of Wood county, he saw him several times during two days, while his trial was in progress, and recognized him as the same man who acknowledged the deed before him in 1890. That he was there as a witness on the part of the State on the trial of said William Devaughn on indictment for uttering and employing as true the deed above referred to, knowing the same to be forged, and that he is certain said Devaughn is the same man who acknowledged said deed. J. S. Plumley in his deposition positively denied that he executed any such deed to Nancy Devaughn, or that he authorized any one else to execute it, or that he was in Marietta, Ohio, during the month of October, 1890; and, when asked what his physical condition was at that time, replied that he was blind, and could not have gone there. It is also shown by Robert Plumley, Harvey P. Williamson, and Amos Williamson, who were neighbors of said J. S. Plumley, in Chester County, Pa., that they reside very near said J. S. Plumley, and that during the month of October, 1890, he was at his home in Pennsylvania, and could not have made the trip to Marietta, Ohio, without their knowledge. My conclusion, therefore, upon the case presented by the evidence, is that the circuit court committed no error in holding the deed from J. S. Plumley to Nancy Devaughn, mentioned in the bill, to be fraudulent and void, and that the same passed no title to said Nancy Devaughn, and that said pretended conveyance is a cloud upon the plaintiff's title to said land, and removing the same as such. The decree complained of is therefore affirmed, with cost and damages to the appellee.

Affirmed.

CHARLESTON.

JARRELL v. FRENCH *et al.*

Submitted January 25, 1897—Decided April 24, 1897.

1. REVERSAL.—*Appellate Court—Review on Appeal.*

Point 1 of syllabus, *Smith v. Yoke*, 27 W. Va. 639, approved. (p. 468.)

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43	456
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2. DOWER—*Release of Dower.*

Dower can only be released by writing under seal and acknowledged. (p. 466.)

3. DOWER—*Decree—Error.*

It is error to decree a specific sum in lieu of dower without the assent of all the parties interested. (p. 470.)

4. APPELLATE COURT.

Point 3 of syllabus, *State v. Lowe*, 21 W. Va. 782, approved. (p. 469.)

Appeal from Circuit Court, Raleigh county.

Bill by Frances Jarrell against C. D. French and others for an assignment of dower, or a gross sum in lieu of dower. From a judgment for complainant, defendants appeal.

Reversed.

JOHNSON & HALE, for appellants.

FARLEY & THOMPSON and W. E. CHILTON, for appellee.

McWHORTER, JUDGE:

Augustus Pack, of Boone county, died in November, 1884, seised of various tracts of land in Boone, Raleigh, and other counties of this State, in which his widow, Frances Pack, who has since intermarried with Leftwich Jarrell, was entitled to dower. Pack was largely involved in debt. Prior to his death, J. P. Underwood's executor instituted a suit in Raleigh County circuit court to subject the lands of said Pack in said county to the payment of the liens thereon; said lands consisting of two tracts of five thousand, six hundred and six, and twenty-four acres, respectively. Said lands were sold under decree in said cause prior to Pack's death, at which sale C. D. French, together with J. M. French and G. W. Easley, became the purchasers. The widow, Frances Pack, by J. M. French, her counsel, filed her bill in Boone county, asking that her dower in all the lands of said Pack be assigned to her in the home lands in Boone County. She afterwards filed a petition in said Raleigh County suit, asking that her dower be set apart in said Raleigh lands. On the 27th day of October, 1885, the Raleigh suit came on again to be further heard, when J. M. French, one of the purchasers of the Raleigh lands, ap-

peared for her, having inserted in said decree the following clause: "And it being admitted in open court by her counsel that Frances Pack, the widow of Augustus Pack, before filing her petition in this cause filed her original bill in the circuit court of Boone county for the purpose of asserting her right to dower in the estate of the said Augustus Pack, it is adjudged, ordered, and decreed that the petition filed by her in this cause at the July term, 1885, be stricken from the docket." At the July term, 1891, of the Boone County circuit court, a decree was entered in several chancery suits involving the estate of said Pack, including the widow's suit for dower, which were heard together; and the said widow was allowed dower in all the lands which had been sold in said suits, which seems to have included all the lands of which Pack died seised, except the Raleigh lands, and a large tract of fourteen thousand five hundred acres which had been sold in proceedings in the United States district court, and also a tract of one thousand nine hundred acres which had been sold for the sum of six thousand dollars under a deed of trust in which the widow had joined, thereby releasing her dower in said tract. December 4, 1891, plaintiff, Frances Jarrell, filed her bill in the circuit court of Raleigh County, setting up her dower in the two tracts sold to C. D. and J. M. French and Easley. Alleging the sale of the same under the decree in said Underwood case to the said Frenches and Easley, and a conveyance since by them to the defendant J. N. Valley, and a further conveyance by said Valley to the defendants Rowlands and Shultz, and exhibiting the several deeds of conveyance to these parties. And alleging that the sale was made under the decree to satisfy sundry judgments against Pack, which were liens upon the land, but that the latter conveyances to French and others do not preclude her from claiming, or bar her right of, dower in said lands, to which she is entitled; that she is entitled to dower in kind in said real estate, but, as the lands were sold under decree of circuit court, the said French, or those claiming under him, may pay her, during her life, lawful interest on one-third of the value of said lands at the time of the sale, which was at least twelve thousand dollars, or pay to her the gross sum in lieu thereof, to be computed on the principle laid down in chapter 65 of

the Code of West Virginia; that she was, at the time of the death of her husband, forty-nine years old, and that she since intermarried with Leftwich Jarrell; that said Underwood suit was brought in Mr. Pack's lifetime, and the other creditors of Pack were brought in, and it was proceeded with as a creditors' suit against said real estate; that at the July term, 1885, she filed a petition in said Underwood cause, praying dower to be assigned to her and computed and allowed to her; and that after said petition had been filed, on the 27th day of October, 1885, the same was stricken from the docket, as above stated, and this was all that was ever done in said suit, or any other suit or proceeding, in regard to the dower of plaintiff in said real estate. Further alleging that afterwards, in the circuit court of Boone County, her said original bill for dower in the estate of A. Pack was heard, together with other creditors' suits pending in said circuit court of Boone County, and in said causes so heard together a report was made by Commissioner William Thompson allowing said petitioner dower in said real estate in Raleigh County, but upon exception being filed to said report the court held and decreed that plaintiff was not entitled to dower in the lands mentioned in Raleigh County, to be assigned out of the lands in Boone county, or to be charged against the fund arising out of the lands in Boone county, sold under decrees in said consolidated causes in Boone county. And alleging that said statement in said decree of October 27, 1885, did not and does not adjudicate or settle her rights in the premises, nor does not bar her in any way from dower in said real estate sold said French, and that she is still entitled to dower as before stated. And praying that the parties named in the caption of the bill be made defendants in the suit, and required to answer the same, and her dower in said lands be assigned to her, or that said French, or those claiming under him said tracts of land, and in possession thereof, be required to pay her, during her life, lawful interest on one-third of the value of said lands at the time of the sale, or pay her a gross sum in lieu of dower, to be computed on principles laid down in chapter 65 of the Code of West Virginia, and praying for general relief.

J. N. Valley filed his answer to the bill, admitting his in-

terest in the lands purchased at said sale, by a subsequent purchase; alleging that by reason of plaintiff's having dismissed her petition October 27, 1885, she was estopped from claiming dower in said lands, especially since they had passed to the hands of innocent purchasers, but that, if the court should be of opinion that she is entitled to dower, they be allowed to pay out of the purchase money still due from them the amount of computation of dower. Defendants J. H. and S. C. Rowland filed their answer, denying the right of plaintiff to have her dower, if she has any in the lands sought to be charged, laid off in kind, and claiming that they and their co-defendants have the right to pay her a sum in gross in lieu of dower, if the court should hold that she is entitled to dower in the lands, under the facts and allegations set out in the answer of J. N. Valley. J. M. French filed his demurrer and answer, alleging that plaintiff is not entitled to claim dower in said land, for the reason that said Augustus Pack had a post-nuptial contract with the said Frances by which she was to have certain personal property and live stock, and its increase, as a marriage settlement made by said Augustus Pack upon the said Frances, and she, in consideration of said settlement, was to have no claim of dower, or interest of any kind, in said Augustus Pack's real estate, which contract was in writing, and, Frances claimed, was burned when the house of Augustus Pack was burned, some time before Pack died; and alleging that Frances had set up said contract in a suit brought by her in the circuit court of Boone County against William Hopkins, administrator of A. Pack, who had taken possession of the said personal property and sold a large part thereof, and recovered the value of said property from said Hopkins, and setting up the said postnuptial contract between her and said Pack as a bar to her right of recovery in this suit, and averring his ability to do the same. Averring further that she was estopped by a former adjudication of her petition in the Raleigh court. Alleging his authority for having the petition dismissed, and that she had authorized him to bring her suit in Boone County to have dower assigned her in all the lands of Pack; that she had directed him to have the suit brought in the circuit court of Raleigh County by Chilton dismissed, and to go on with the suit in Boone

County, and have her dower consolidated and laid off out of the home place in Boone County, and by her direction, as her counsel, he had made a full statement of the facts to the judge of the circuit court of Raleigh County in open court, and the court directed the suit brought by said Chilton dismissed, and claiming that she, having made her election to take her whole dower in the Boone lands, was estopped from prosecuting this suit.

At the June rules, 1893, plaintiff filed her amended and supplemental bill, alleging, in addition to the allegations of the original bill, that she had never been assigned, or in any way received, dower in the Raleigh county lands; that J. M. French had been her husband's attorney for a considerable time prior to his death, and was retained by him as his legal adviser, and acted in nearly if not all of the numerous suits brought by her husband, as well as acted for him in suits brought against him; that being cognizant of all the facts, and of the intimate acquaintance of the said defendant James M. French with all the business of her late husband, even to its minutest details, and relying upon his integrity and ability as an attorney at law, she employed him to take whatever steps were necessary to protect her interests and recover her rights in the estate left by her late husband; that a suit was instituted in Boone county and decree had therein as alleged in the original bill; that a petition was also filed in the suit of Underwood's executor against Pack and others in the circuit court of Raleigh county, asking that her dower be assigned in the Raleigh county lands; that defendant French was employed by her to file said petition and bring said suit in Boone county, and she relied upon him, as attorney, to attend to her interests, and, while he was so acting and she was so relying upon him, he became the purchaser of an interest in the lands sold in the Underwood case; that that fact was not known to her for a long time,—not until, in fact, a short time before the filing of her original bill; that he became interested in the purchase of said lands on the 27th day of April, 1885, and on the 27th day of October, 1885, he caused the decree of dismissal of her petition filed in the suit to be entered, which was done without her knowledge or consent; that she was informed that C. D. French and Easley were joint-

ly interested with the defendant J. M. French in the purchase of the land: that Easley, who had since died, was an attorney at law, and that before the purchase he, in company with C. D. French, went to Raleigh and Boone counties, and made a careful examination of the records in the suits in each of said counties, in which the estate of her late husband was involved, and that they were fully cognizant of the relation in which J. M. French stood to her; that she never at any time authorized J. M. French to dismiss the petition for dower in the Raleigh county lands, nor did she ever agree with him or any one else, or represent to any one, that she desired the value of her dower in the Raleigh lands assigned to her out of the lands in Boone county; that she is entitled to dower in the Raleigh lands, and not barred from right of dower therein. And praying for her dower in said lands to be assigned to her, or that said French, or those claiming under him the said tracts of land, be required to pay her, during her life, lawful interest on one-third of the value of the land, or pay her a gross sum in lieu of said dower, and for general relief.

Defendant James M. French filed his demurrer and answer to the amended bill, referring to his answer to the original bill, and making it a part of this answer, so far as it is applicable and responsive to the allegations contained in said amended bill. And in answer to the additional and supplemental matters, if any there be set up in plaintiff's amended bill, defendant says that it may be true, as is charged therein, that plaintiff has never received or been assigned dower in the Raleigh county lands, in the original and amended bills described, but avers that it is for the reason that she is not entitled now, and never was entitled, to dower in the Raleigh county lands, and, even if she ever was so entitled, she waived and lost her right thereto by reason of claiming and taking her dower in the Boone county lands, and by filing her petition in the chancery suit of Underwood in Raleigh county, and then dismissing her petition therein. Denying that he had filed said petition for her, but that it was filed by William E. Chilton, her attorney, and dismissed by her direction. Admitting that he had been employed in matters of Pack's litigation in Boone and Raleigh counties, but not in all

his business. That Pack requested him to induce purchasers to come to the sale and buy the Raleigh land. That he did get G. W. Easley and C. D. French to attend the sale, when it was sold to C. D. French at one dollar and twenty cents per acre, having theretofore sold for between seven hundred dollars and eight hundred dollars, which sale was set aside. The purchase price in the last sale amounted to over six thousand dollars, which was regarded by Pack as a good sale at the time. That before the next term of the county Pack died, and the suit was revived against the widow, children, and heirs, which delayed the confirmation of the sale. In the meantime plaintiff employed defendant to bring her suit for dower in Boone county, wherein she asked to have her dower consolidated in the home lands, saying that dower in the wild lands in Raleigh and Boone counties would be of no use to her; that she had been advised that, if they were assigned to her, she would have no right to remove the timber from the same,—saying that she had some children to raise, and, if she could have her dower assigned to her out of the home lands, which was mostly river bottom and cleared land, it would enable her to provide for and maintain her children. Plaintiff told defendant that she had employed William E. Chilton to have her dower assigned to her out of the Cabin Creek lands, which had been alienated in the lifetime of her husband to one Jed Hotchkiss, and that she was informed by said Chilton that she could get computation in lieu of dower in kind, and that the Hotchkiss land had been sold under a decree in favor of said Pack for sixty thousand dollars, and that she would be able to obtain from that source all the money she might stand in need of. That defendant told the plaintiff at the time he filed her bill for dower that he was interested in the sale of the two tracts which had been made in Raleigh county, and which was bid in by C. D. French; that it made no difference, however, with the purchasers; if she claimed computation in lieu of dower, it would be paid, under the direction of the court, out of the purchase price; that if she claimed it in kind, and it was assigned her, they would not take the land, and that it was important for her to determine what she would do at once, and, with a full knowledge of the facts, she determined to bring

the suit just as he brought it; and denying the statement that she never authorized him to dismiss the petition. That, when he heard that she had filed a petition in Raleigh county, he mentioned the matter to her, and she said it was a mistake of Mr. Chilton; that she had employed him to file her petition in Kanawha county for her dower in Cabin Creek lands, but had not employed him to file any petition in Raleigh circuit court for dower,—and then authorized and directed defendant to have it dismissed, and gave him a writing to that effect to show to said Easley and French. That he had made diligent search for said writing, but had been unable to find it, and is under the impression that he lost it when he came so near being drowned in the New river, a year or two ago. That he never heard of defendant claiming dower in the Raleigh county lands until long after the purchase money had been fully paid by him and his co-defendants, or until after plaintiff had married Leftwich Jarrell. And he claimed that it would be a gross fraud upon him and his co-defendants to have her dower at this late day, in the face of her own election allowed her; and he denied the charge that he had abandoned her business. That he was taken sick, and in bad health for many months, and was unable to go and attend to the Boone county suit.

C. D. French filed an answer denying the allegations of the bill, and claiming that plaintiff was estopped from claiming dower in this land because her former petition had been dismissed at her own instance, by her direction and authority, and that after the dismissal and abandonment of her claim she stood by for years, saw the sale of the land confirmed to the defendants, the purchase money paid into court, and the same disbursed to the creditors of Augustus Pack, without protest on her part, which works an estoppel.

Appellants' first assignment of error is that "plaintiff, having filed her petition in the Underwood suit in Raleigh circuit court, praying for assignment of her dower in lands sold therein for the benefit of lien creditors, and afterwards dismissing her said petition, admitting that she had theretofore filed her bill in the circuit court of Boone county (where her husband had other lands) for the purpose of having dower laid off to her in all the lands belonging to

her late husband." While it is true that plaintiff filed a petition in the cause of Underwood, *etc.*, against Pack and others in Raleigh circuit court, as set out in said assignment of error, and the same was afterwards dismissed on the 27th day of October, 1885, without adjudication of the matters set up in the petition, plaintiff alleges in her bill that she never authorized such dismissal, and so states in her deposition, and insists that it was without her knowledge or consent; that she had employed defendant J. M. French as attorney to attend to her interests in the matter of her dower; and that, instead of looking after it, he, without authority, dismissed the petition, and then failed to prosecute the suit in Boone circuit court which he had instituted and undertaken to prosecute for her. On the other hand, defendant French contends, as well in his answer, to which replication was made, as in his deposition, that he had from plaintiff full authority to dismiss said petition, and states that, because of personal and family afflictions, he was unable to attend to the suit in Boone county to have plaintiff's dower assigned, as was contemplated in the bill there filed. The deposition of defendant C. D. French is taken in support of defendants' contention. This witness says that he knew at the time he purchased that plaintiff had dower in the land; that after they purchased, and after the sale was confirmed, he learned, and probably might have known before, that plaintiff had filed her petition in said suit, asking for dower in said land, but, before paying in full the purchase money, they desired this dower right of plaintiff settled, and J. M. French, who is a lawyer, went, at request of Easley and himself, to see plaintiff and get said dower matter arranged. French returned from his visit to plaintiff, and showed Easley and witness a paper writing purporting to be signed by plaintiff, authorizing the purchasers of the Raleigh land to pay the purchase money into court for the benefit of the estate of her husband, and, if they would do so, she would not claim dower in the Raleigh lands, but would take her dower all together in Boone county lands; and the said paper directed said J. M. French to dismiss her petition for dower in the Raleigh lands, and have her dower all thrown together; which paper was examined in witness' presence by J. M. French and

Easley, both of them lawyers, who pronounced the paper good and all right. They then drew a decree, and had it entered of record, dismissing the plaintiff's petition, after which they paid the purchase money into court, through the commissioner, and allowed the same to be paid out to creditors of Pack, which was done because of the direction of plaintiff contained in said paper. Witness further stated that, about a year after he got his deed for the land, they were about to sell the timber on the land to J. M. Thomas, and J. M. French, Easley, J. M. Thomas, and witness stayed all night at plaintiff's house, while they were negotiating the sale to said Thomas. The plaintiff then or since, until the bringing of this suit, made and had made no demand for dower whatever in said land, of any character whatever, and that the last witness saw of the paper it was in the possession of the defendant J. M. French. This is all the evidence to sustain the position of the defendant French. J. M. French occupies the delicate and very embarrassing relation of attorney and counsel for plaintiff, and one of the purchasers of the land in whose interest the petition for dower was dismissed in said suit, and which was done on his motion. J. M. French files as an exhibit with his deposition a copy of a written contract with plaintiff, covering his employment as an attorney as follows: "I, Frances Pack, have heretofore employed James M. French to bring suit to have my dower assigned me in the estate of my late husband, Augustus Pack, and, being desirous of securing his services on my behalf in all things arising out of my said husband's estate, I do hereby agree to pay said James M. French reasonable fees for all services in representing my interest in my said husband's estate. Witness my hand and seal August 22d, 1885. Frances Pack. [seal.]" Plaintiff's rights were not adjudicated, and release must be by deed. *Countz v. Geiger*, 1 Call, 165. "A *feme covert* must relinquish her equitable as well as legal rights, separate and apart from her husband." 5 Am. & Eng. Enc. Law, pp. 912, 913, and cases there cited.

The second assignment of error, as stated, is that, "in the suit brought by the plaintiff in Boone county for dower as aforesaid, dower was assigned to the plaintiff in all the lands of her late husband, including the Raleigh

county lands involved in this suit," and refers to pages 61, 62, and 63 of the record. By reference thereto, which is the decree entered at the July term, 1891, in the several causes involving the estate of Augustus Pack, including said suit for dower, it is decreed that "said Frances Jarrell is allowed dower, in the rate of nineteen dollars forty-one and two-fifth cents, on each one hundred dollars' worth of land sold in this cause, except six thousand dollars for the land, and including the six hundred dollars aforesaid, in the Curtis branch lands, making seven thousand eight hundred and ninety-eight dollars, in which she is entitled to dower at the rate aforesaid, making the full amount of her dower at this date one thousand five hundred and thirty-three dollars and twenty-nine cents instead of two thousand five hundred and eighty-one dollars and fifty-seven cents; and said land so sold in these causes is confirmed to the purchasers thereof, respectively, free and discharged from the dower of said Frances Jarrell (formerly Pack)." The six thousand dollars mentioned in the decree as being excepted is that referred to in the fifth exception taken to the commissioner's report by W. C. Hopkins, administrator of A. Pack, in these words: "(5) To the amount of dower due Frances Jarrell, the commissioner, in allowing said dower, allowed her in the \$6,000 arising from sale of the 1,900-acre tract purchased herein by W. E. Chilton, where this land is included in the trust deed in which Mrs. Jarrell joined, and by decree of this court this \$6,000 has been transferred to the trustees in said trust deed, to be distributed by the United States federal court. Mrs. Jarrell's dower should be estimated on the lands sold in this cause, less the \$6,000, and the amount of her dower reported in said report is therefore wrong, and should not be allowed." So that dower in this six thousand dollars was disallowed, reducing the dower so allowed for land sold in Boone county from two thousand five hundred and eighty-one dollars and fifty-seven cents to one thousand five hundred and thirty-three dollars and twenty-nine cents, as provided in the decree. Commissioner Thompson's report, upon which said decree was based, gives a list of sales and amounts of purchase money of property sold in said Boone suit, amounting in all to thirteen thousand two hundred and ninety-eight dol-

lars, from which amount is deducted the six thousand dollars in which plaintiff was not entitled to dower, leaving seven thousand two hundred and ninety-eight dollars; and adding to this last sum six hundred dollars, arising from the sale of the land called "Curtis Branch Lands," sold in said Boone suit, makes the total amount in which she was entitled to dower seven thousand eight hundred and ninety-eight dollars, all of which arose from sales of land under the Boone suits. In said commissioner's report the following reference is made to the Raleigh lands: "The copies of the proceedings of the suit in Raleigh county show that the assets arising from the sales of land made in that county amount to the sum of \$7,927.75, and there has been paid to the creditors the amount of \$7,283.07." So that it is made clear that plaintiff received nothing in the Boone suits on account of dower in the Raleigh lands.

The third assignment is that "the plaintiff represented to the petitioner, C. D. French, after he had purchased the said Raleigh county lands, but before he paid the purchase money therefor, that she had filed her bill in Boone county for dower in all of her late husband's lands, and that she did not intend to claim dower in the Raleigh lands purchased by him; thus inducing him to pay all the purchase money for said lands, and permitting it to be distributed to said Pack's creditors. She is estopped from setting up dower in said lands now." The circumstances of the case, the interest of the co-purchasers (the said C. D. French being a large lien creditor of Pack, to the amount of four thousand four hundred and nineteen dollars, which was paid out of the proceeds of the sale of the Raleigh lands), and the relationship of one of them (of attorney and counsel) to the plaintiff, together with the direct conflict of testimony taken and filed in the cause, fully authorize the court's finding. *Smith v. Yoke*, 27 W. Va. 639.

The fourth assignment is that "if she ever had any claim in the Raleigh county lands, it ought to have been assigned to her out of the unaliened lands of her husband, Augustus Pack. *Stimson v. Thorn*, 25 Grat. 278." The appellants rely, under this assignment, on *Stimson v. Thorn*; but the circumstances of this case take it without the purview of that case, because, without the fault of plaintiff, the suit

in Boone county instituted for the purpose of giving her her whole dower in all her husband's land in Boone county was not so prosecuted as to secure that end, and by the negligence of her attorney, J. M. French, who is also one of the purchasers of the Raleigh lands, the said suit failed of its purpose, and she was by said suit only endowed of his other lands, and excluding the Raleigh lands; and the court having found under the pleadings and evidence in the cause, which is contradictory, as stated, the said findings on this assignment will not be disturbed.

The fifth assignment is that "plaintiff has waived all claim to dower in said Raleigh county lands." This is simply a repetition in another form of the third assignment.

The sixth assignment is, "Plaintiff is not entitled to dower in these lands, by reason of an ante-nuptial contract made with her late husband, which is referred to in the answer of petitioner, J. M. French, and not denied by the plaintiff in this cause." It is true, such a contract is mentioned in the answer of J. M. French, but therein called a "postnuptial contract" (I presume, by mistake, as it is referred to in appellants' brief as an "antenuptial contract"), to which answer there is replication, and the proof to establish said contract wholly fails. No proof was taken to establish any such contract.

The eighth assignment is, "The decree complained of shows that it was rendered by Thomas G. Mann, Esq., but the decree does not show that he was a resident of the State, and a practicing attorney in some court in this State." The decree complained of starts out with: "It appearing that the judge of this Court is so situated as to render it improper for him to sit in this case, an election was ordered to be held by the clerk of this Court for the purpose of electing a special judge to try the same. Thereupon an election was held according to law, and Thomas G. Mann was elected special judge to try this case, and, after taking the oath prescribed by law, proceeded to hear the same, and rendered this decree." No objection was raised to his service in that capacity. If he was not properly elected, the objection should have been made then, and it is too late to raise it in this Court for the first time. *State v. Lowe*, 21 W. Va. 782, syl. 3.

The seventh assignment is, "The court erred upon the whole record in this case." Appellants C. D. and J. M. French object in their pleadings to the assignment of a specific sum from the value of said lands in lieu of dower set apart in kind in said Raleigh lands. *Blair v. Thompson*, 11 Grat. 441. "There cannot be a decree for a specific sum in lieu of dower without the assent of all the parties interested." Therefore the court erred in decreeing that plaintiff receive the sum of one thousand, two hundred and thirty-three dollars in lieu of her dower in said lands. The decree is reversed and cause remanded, with directions for such proceedings to be had therein as to assign dower in kind in said five thousand, six hundred and thirty acres of land to plaintiff.

Reversed.

CHARLESTON.

PARKERSBURG INDUSTRIAL Co. v. SCHULTZ, *et al.*

Submitted February 4, 1897—Decided April 24, 1897.

1. ADVERSE POSSESSION—*Continuity—Title.*

Mere naked possession of land without claim of right is no adverse possession, and, no matter how long continued, will not furnish a defense to an action or confer title. (p. 472.)

2. ADVERSE POSSESSION—*Inclosure—Improvements.*

One in adverse possession of land without paper title has adverse possession only to the extent of his inclosure or actual improvement. (p. 472.)

ADVERSE POSSESSION—*Inclosure—Partial Inclosure.*

Possession by inclosure, to be adverse, must be such as to be exclusive possession, a real and substantial inclosure, an actual occupancy, which is definite, positive, and notorious, when that is the only defense against a legal title. Therefore a partial inclosure of land capable of total inclosure, leaving part of its boundary open, is not sufficient. (p. 473.)

ADVERSE POSSESSION.

A party relying on adverse possession must show clearly all the requirements of the doctrine. (p. 473.)

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5. STATUTE OF LIMITATIONS—*Title—Ejectment.*

The statute of limitations confers a legal title, enabling one not only to defend but to maintain ejectment or other action on its strength. (p. 475.)

6. EJECTMENT—*Title in Stranger—Burden of Proof—Evidence.*

To defeat an action of ejectment by an outstanding title in a stranger, the defendant must show it to be a present, subsisting, operative legal title, on which the owner could recover if asserting it in an action. It is not for the plaintiff to disprove its validity. (p. 476.)

7. TITLE—*Statute of Limitations—Forfeiture.*

Title vested under the statute of limitations may be forfeited for nonentry for taxation or lost by adversary possession under the statute of limitations. (p. 481.)

8. ADVERSE POSSESSION—*Continuity—Subsequent Entry.*

Adverse possession is lost by break in its continuity, by abandonment, or other cause, before the bar of the statute is complete, and seisin is restored to the true owner. A subsequent entry is a new disseisin, and cannot be added to the former possession. (p. 474.)

9. INSTRUCTIONS—*Hypothetical Instructions.*

Instructions must not be obscure, or vague and indefinite, or put inconsistent legal propositions, or propositions which no evidence fairly presents, or be inconsistent with others in the case, or present a certain hypothesis and make the case turn wholly on it, disregarding another hypothesis fairly arising on the evidence. (p. 482.)

10. EVIDENCE—*Claim—Title.*

Declarations of one in possession of land explanatory of such possession, as under what right or claim, are admissible to show his claim, but not to show title. (p. 473.)

11. CONSTITUTIONAL LAW—*Forfeiture.*

Is the statute forfeiting tracts of less than one thousand acres of land constitutional? (p. 478.)

Error to Circuit Court, Wood county.

Ejectment by the Parkersburg Industrial Company against Otto Schultz and others. From a judgment for defendants, plaintiff brings error.

Reversed.

MERRICK & SMITH, for plaintiff in error.

L. D. TURNER and H. P. CAMDEN, for defendants in error.

BRANNON, JUDGE:

This is an action of ejectment brought by the Parkersburg Industrial Company against Otto Schultz and others to recover six coterminous town lots, numbered from seven to twelve, inclusive, containing one hundred and twenty-six poles in the aggregate, lying near the mouth of the Little Kanawha river, on the south side of it from Parkersburg. The plaintiff traced title from the State of Virginia under two patents,—one to James Neal, dated September 14, 1785, for four hundred acres, and one to John Stokely, for one thousand two hundred acres, dated May 9, 1804. In the line of this title was a deed from Stokely to J. B. Beckwith, dated November 2, 1844, for two hundred and twenty-five acres and ninety-seven poles. The defendants showed no paper title, but relied solely on adversary possession under some claim under Elijah Spencer, and an outstanding title, under a grant from King George III. to Daniel Richardson and others, dated December 1, 1773, for twenty-eight thousand four hundred acres of land.

We must now inquire into this defense of adversary possession. Where one man has actual possession of land of another, if he makes no claim to own it, he is merely an intruder, called commonly a "squatter," and, no matter how long he may continue there, the statute of limitations will confer no right upon him, because he makes no claim against the true owner and his possession is, therefore, not adversary. *Creekmur v. Creekmur*, 75 Va. 430; *Norlin v. Reynolds*, 25 Grat. 141; *Hudson v. Putney*, 14 W. Va. 561, point 4; *Hutch. Land Titles*, § 408; *Kincheloe v. Tracervells*, 11 Grat. 588, point 7. If, however, he claims ownership in the land, though he have no writing giving color of title, the statute does run in his favor, and at the end of the period of limitation prescribed by it will give him title, but only to the extent of his inclosure or improvement. *Core v. Faupel*, 24 W. Va. 238, point 7; *Jarrett v. Stevens*, 36 W. Va. 445 (15 S. E. 177); *Oney v. Clendennin*, 28 W. Va. 34, point 4. If he have a writing, giving color of title, his possession goes to the extent of the boundaries specified in it where there is no actual adverse possession under the better title within it. Code 1891, c. 90, s. 19; *Oney v.*

Clendennin, 28 W. Va. 34. Possession under writing imports that it is under claim of title and adverse, and will go to its boundaries. *Ketchum v. Spurlock*, 34 W. Va. 597 (12 S. E. 832). Spencer set up some claim to this land as shown by his mere declarations. Declarations of one in possession, explanatory of his possession and making claim, are admissible evidence, while he is in possession, to show that he is in under claim of ownership, but not to show title. *Hugh v. Pancake*, 42 W. Va. 602 (26 S. E. 536); 1 Greenl. Ev. § 109; *Royall v. Lisle*, 60 Am. Dec. 712. Let us look at the character of possession in this case. There was no building, cultivation, or improvement upon this land. The only basis for adversary possession is an inclosure by a fence. Under the evidence the question presents itself whether this fence was such as the law contemplates to give adversary possession. Here we must first note that, as it defeats the true title, adversary possession must be taken strictly, and the facts to sustain it proven clearly. *Irvine v. McRee*, 42 Am. Dec. 468; *Hale v. Glidden*, 10 N. H. 402. The evidence shows that in 1843 or 1844 a fence, composed perhaps of slabs, inclosed two sides of these lots, but not the whole area. Certainly one side was left open. Our cases hold that adverse possession must be "exclusive"; that is, shut the adverse claimant out. In *Jackson v. Shoonmaker*, 2 Johns. 230, Chief Justice Kent said that a possession fence, by felling trees and lapping them one upon the other around the land, was "too loose" a mode of taking possession to be considered adverse possession. He said: "There must be a real and substantial inclosure, an actual occupancy, a *possessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defense, to countervail a legal title." Same in *Coburn v. Hollis*, 3 Metc. (Mass.) 125. In *Hale v. Glidden*, 10 N. H. 397, it was held that an inclosure by a brush fence and cutting wood from a wood lot, where a person had no color of title, is insufficient; the possession must be actual, permanent, and exclusive, marked by definite boundaries. In *Armstrong v. Risteau* (Md.) 59 Am. Dec. 115, it was held that fences on three sides of an oblong or square piece of land are not such an inclosure as would constitute adverse possession where such inclosure is necessary. See

Busw. Lim. § 247. Possession, to be adverse, must be actual, continued, visible, notorious, distinct, and hostile. It must be such that the owner may be presumed to have notice of it and its extent. It must be open, visible, and exclusive. *Core v. Faupel*, 24 W. Va. 238, point 5. It has been several times held that protection of the land by substantial inclosure sufficient to turn stock is necessary, and that it is not sufficient where it is insufficient to turn stock. Note to *Plume v. Seward*, 60 Am. Dec. 604. A poor fence around a part of this small area, leaving it open, with no building or cultivation, would not be distinct, hostile possession, excluding the owner, giving him warning of adverse claim, but would rather indicate an abandonment of a once-intended claim. Though from Spencer's declarations we may say he at one time set up a claim, yet he abandoned it, as he never completed this small inclosure. Other lots very close he kept inclosed, but let this go, evincing an abandonment.

Here comes in another point of weakness, forbidding us from considering this inclosure as conferring title. One of the indispensable elements of adversary possession is that it must be continuous for the whole period prescribed by the statute. It is indefinite when this possession began, but say 1843. As an inclosure it ended in 1853. The bulk of the evidence clearly shows this. One of Spencer's sons, living just there, possessing peculiar means of information, said he did not "remember of the land in controversy being fenced after 1853; we let the fence go." Other evidence fixes 1853 as the latest date at which, if ever, it could be considered such a fence as the law requires. Certainly we have to say that after that date it was neglected, and in fact abandoned, going into utter dilapidation. Some of its rails did continue there of course, and were burnt by the troops in the Civil War, in 1861, but they were simply remnants of what had been for years a skeleton of its former self. Thus there was only ten years of adversary possession, if any ever existed, and to confer title the then existing law required fifteen years. The present period of ten years first began with the Virginia act of March 27, 1861. Hutch. Land Titles, § 443. To confer title by the statute of limitations, it is indispensable that the possession be unbroken and continuous for

the period of the statute. *Core v. Faupel*, 24 W. Va. 239; *Oney v. Clendennin*, 28 W. Va. 34. Ever so short a break will destroy all the preceding holdings, and the possession must begin *de novo*. Hutch. Land Titles, § 378; *Downing v. Mayes* (Ill. Sup.) 38 N. E. 620. So, if there be a voluntary abandonment before the bar is complete, the possession amounts to nothing. *Taylor's devisees v. Burnside*, 1 Grat. 165; *Armstrong v. Morrill*, 14 Wall. 146. But suppose, as claimed, the possession continued down to 1860 by inclosure, then the statute would have conferred title on Spencer, for the statute itself confers and invests title in the occupant as effectually as does descent, devise, or grant, so that he may not only defend, but, if afterwards another enter upon the land, he may maintain ejectment on the title conferred by the statute, though he have not the scratch of a pen to show title. *Garrett v. Ramsey*, 26 W. Va. 345, point 4; 1 Am. & Eng. Enc. Law (2d Ed.) 883; Hutch. Land Titles, pp. 237, 238; *Bicknell v. Comstock*, 118 U. S. 150, (5 Sup. Ct. 399); Busw. Lim. § 229; Wood, Lim. Act. 498. When once vested, the title cannot be lost by mere abandonment. *Mitchell v. Carder*, 21 W. Va. 277. But, like any other title, a title acquired by adversary possession may itself in turn be destroyed by adversary possession. Now, if Spencer had so acquired such title, it was lost long before this suit by adverse possession, within the bounds of the Beckwith tract, of two hundred and twenty-five acres and ninety-seven poles. For more than ten years there was actual possession of it under the Beckwith right, under which the plaintiff claims, by inclosure and cultivation of a field of thirty-five acres, erection of a mill, and many accompanying acts of ownership at different times, such as taking timber and rock hauled over the very land in controversy. True, possession was not on these particular lots; but, in the absence of their occupation (and it is not claimed that it continued longer than 1860), this possession under the Beckwith claim spread over these lots and defeated this hostile title supposed to be acquired under the Spencer claim. So I see nothing under the head of adversary possession to defeat the title of the plaintiff.

But it is said that the plaintiff cannot succeed because of the said patent from King George III, as it shows an

older outstanding title. This title is a stranger to all the parties in this suit, as none of them connect with it. It is settled law that the plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's title, and therefore, if a valid title be shown to exist in a third party, though the defendant is not entitled to it, yet it defeats the plaintiff; but it is not merely elder title that will defeat the plaintiff, for it must be a present, subsisting, and operative legal title, on which the owner could recover if asserting it by action. *Reussens v. Larson*, 91 Va. 226 (21 S. E. 347). But is the defendant to show facts to show that it is still a good title? or, when he presents this grant, is it presumed to be good until the plaintiff repel it? In the long lapse of time since this King George grant issued, we have had many laws forfeiting and selling lands for delinquency and omission, and as a matter of history we know that many of these old grants are extinct under these laws. Vast estates have been thus sunk in the sea of time under these laws since the date of that grant. Say that a plaintiff has shown a right to recover as between him and the defendant, the defendant says the true right is in a stranger. It is his plea. He must make it good. Newell on Ejectment (p. 652) says that "a defendant who sets up an outstanding title in a third person as a defense to an action for the recovery of the possession of real property must show that such title is still a living and effective title, not barred by the statute of limitations, or in any other way ineffectual or void." We have the high authority of the United States Supreme Court in *Greenleaf v. Birth*, 6 Pet. 302, for this language: "In the case before the court the defendant [meaning plaintiff] has shown *prima facie* a good title to recover. The defendant sets up no title in himself, but seeks to maintain his position as a mere intruder by setting up title in third persons with whom he has no privity. In such a case it is incumbent upon the party setting up the defense to establish the existence of such an outstanding title beyond all controversy. It is not sufficient for him to show that there may be possibly such a title. If he leaves it in doubt, that is enough for the plaintiff. He has a right to stand upon his *prima facie* good title, but he is not bound to furnish any evidence to assist the defense.

It is not incumbent on him negatively to establish the non-existence of such an outstanding title. It is the duty of the defendant to make its existence certain." No possession under this old grant was shown; nothing as to its taxation; simply the dry grant. That was not enough. Moreover, the possession of the Beckwith tract for more than ten years defeated the older right under the King George grant, and for that reason it was not a subsisting grant as against the Beckwith right. That possession under the Beckwith right, though not on the lands in controversy, extended to the boundaries of the tract, covering the land in controversy, under authorities above shown, as Beckwith was in actual possession of his land, which constituted an interference or an interlock, if we call it such. No possession anywhere was shown under the King George patent. It cannot be questioned that the King George patent covered all the Beckwith tract, as it calls for the mouth of the Little Kanawha, and runs up it and down the Ohio far enough necessarily and indisputably to include the Beckwith tract.

It is argued that the right of the defendants, if any was acquired by possession, has become forfeited for non-entry for taxes, and that this right vests in the plaintiff under the Beckwith title to the two hundred and twenty-five acres, because that tract had been in possession for five years and taxes paid before this suit began. I think this is clearly so, because this land was never on the tax books until 1884 under this Spencer claim, and chapter 125, s. 7, Acts 1869, found in section 34, chapter 31, Code 1868, would forfeit it. If it be said that section 6, Art. XIII., of the Constitution of 1872, operates to withdraw the years 1870, 1871, and 1872 from computation in the forfeiture of tracts of less than one thousand acres under said act, I answer that it may be so as to lands not completely forfeited when the Constitution took effect, August 15, 1872, yet not so as to tracts which, under the act of 1869, had become completely forfeited, and vested in the State, as this had. It did not intend to include those years after 1869, so to operate on lands already forfeited, because section 3, Art. XIII., of the same Constitution, made provision as to land then already forfeited by transferring it to certain persons (and under this the owners of the Beckwith

title would get the forfeiture title), and selling that not transferred. So the Constitution only withdrew those years from operation to forfeit as to tracts in process of forfeiture. The land claimed by the defendants would also be forfeited under Acts 1872-73, p. 331, c. 117, for five years' omission after 1872, and would vest in the Beckwith title under the same act (*Id.* p. 332) if that clause forfeiting tracts of less than one thousand acres be constitutional. It is not necessary for the purposes of this case to decide that point. Speaking for myself, I cannot rid myself of a doubt, long entertained, whether statutory provisions, enacted since the Constitution of 1872, forfeiting tracts of less than one thousand acres for non-entry are Constitutional. The Constitution of 1863 (Article IX., sec. 4) released taxes since 1831 on tracts where the amount was less than twenty dollars, and released all tracts of less than one thousand acres forfeited for non-entry since 1831 (if there were any), thus evincing a policy to forgive small tracts because the State would not lose much thereby, but chiefly because small tracts had been as a general thing settled upon, and on them were the homes of our people, whereas the large tracts were wild and owed large taxes, and prevented the settlement of the country, and it was necessary for the progress of the country to remove them out of the way of settlement and improvement. The act of 1869 forfeited all tracts for non-entry without regard to quantity, but the Constitution of 1872 (Article XIII., sec. 6), while it declared that owners should put all tracts, whether under or over one thousand acres, on the tax books, yet, when it denounced the penalty of forfeiture for failure to do so as a rule for all future time, it applied it only to tracts of over one thousand acres, thus reasserting the wisdom of the same policy inaugurated in favor of small tracts by the first Constitution. This Constitution of 1872 carefully divided tracts into two classes,—one, those tracts containing one thousand acres or more; the other, those containing less than that amount,—and, as a rule for the future, denounced forfeiture against only one class. Why does not this come under the rule of construction that the expression of one thing is the exclusion of another? It is a strong case of implied prohibition. It seems unreasonable to say that, when the convention and

people took up this subject of the forfeiture of lands for non-entry, and divided them into two classes, and fulminated the penalty of forfeiture against only one, as a rule and policy for the future, it left it to the legislature to impose forfeiture on the other. It seems to me this act contravenes the plain policy and rule of the Constitution. It is true this prohibition against the forfeiture of small tracts is only by implication, but is it not a strong and plain implication? An act may be void, as against the plain implication of the constitution, as well as when it is against its expression. Cooley, Const. Lim. p. 78, says: "Another rule of construction is that, when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases." Chief Justice Thompson said, in *Page v. Allen*, 58 Pa. St. 346: "The expression of one thing in the constitution is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions not declaratory in their nature." Such is the character of the provision under discussion. See End. Interp. St. § 533, and *Donaldson v. Voltz*, 19 W. Va. 156. Did the Constitution of 1872 repeal the forfeiture clause of the act of 1869? That act says that omission for years both prior and subsequent to 1869 shall forfeit, while the Constitution says that only years subsequent shall do so. They are repugnant as to tracts of one thousand acres. But did the act yet operate as to tracts of less? If so, years prior to 1869 counted against them, and those prior years ran against the small tracts, and not against the large. This can not be. The intent was that years prior to 1869 should not count in either case. I use this argument to show that the convention took up this subject of forfeiture for omission, and imbedded in the Constitution a full and complete provision on the subject, covering the whole subject, and said just where, in the future, it intended to employ the harsh remedy of forfeiture, denouncing it against some tracts, and by strong implication prohibiting it as to others for the future, and thus repealed the old rule and instituted a new. *Herron v. Carson*, 26 W. Va. 62. This remedy by

forfeiture is the most drastic, severe, and terrible remedy which the state can adopt against its land owners, and ought we not to lean in favor of that construction which would narrow rather than extend its application?

INSTRUCTIONS.

The court erred in refusing plaintiff's instruction No. 1, to the effect that the defendants, in making out their defense under the statute, were required to show under what color or claim of title they relied, and also that such adverse possession in the premises continued unbroken for the full period of ten years before the institution of this suit; that, if they relied on adversary possession as completed before March 27, 1861, then they must show its continuance unbroken for the period of fifteen years. Principles stated above show that this instruction should have been given. Instead of giving it, the court substituted one saying generally that adversary possession for ten years was sufficient, without discrimination as to whether the bar was supposed to be complete before or after the act of 1861, and in the face of the fact that there was no evidence tending to show any continuance of possession after that act, and that would require fifteen years, whereas that instruction fixed ten.

Under principles above stated, it was error to refuse to give plaintiff's instruction No. 7, stating that, though the David Richardson patent was prior to the Neal and Stokely patents under which Beckwith claimed the two hundred and twenty-five acres and ninety-seven poles, yet that if Beckwith, prior to the conveyance made to him by William Bently, trustee, and for ten years prior to the institution of this suit, had actual possession of said two hundred and twenty-five acres and ninety-seven poles under the David Richardson patent then the Richardson patent would not interfere with the recovery of the land by the plaintiff.

The court erred in giving defendants' instruction No. 3, telling the jury that the David Richardson grant was the oldest, and conferred title, and if it covered the land in controversy the plaintiff could not recover, unless the jury was satisfied that the land had been forfeited to the State for non-entry on the books, and for failure to pay taxes

thereon. There was no evidence touching this matter. It was for the defendant to show its entry for taxes. The defendant had no right, on the showing made by him as to this King George grant to Richardson, to present a case on it. Another grave objection to this instruction is that it utterly ignores any reference to the evidence to show that possession under the Beckwith right adverse to the Richardson right entered into the question before the jury. It told the jury that the only thing that could defeat the old King George grant was forfeiture for taxes, closing its eyes to the fact that it might be defeated by actual adverse possession. An instruction cannot seize upon one fact, or one state of facts, and make the case turn solely on them, keeping the jury from inquiring into other facts material in the case under the evidence. *McCreery v. Railroad Co.*, 43 W. Va. 110 (27 S. E. 327); *Stors v. Feick*, 24 W. Va. 606; *Thompson v. Douglass*, 35 W. Va. 344, (13 S. E. 1015).

The court also erred in giving defendants' instruction No. 4, saying that if Elijah Spencer rented and took possession of the land in 1836, or shortly thereafter, claiming the same from the bank of the Little Kanawha river back to the foot of the hill called "Ft. Boreman," and inclosed and otherwise improved the same, and kept it enclosed for fifteen years, and that he and those under him continued to occupy openly and notoriously the premises, including the land in controversy, by the exercise of acts of ownership, claiming the same adversely for a period of more than ten years. then they must find for the defendants. This instruction, as applied to this case was very misleading. There is no evidence to show that Spencer ever rented to or from anybody. It was abstract in presenting any matter of rent, and was foreign to the case. There was no evidence tending to show that Spencer took possession of it in 1883 or shortly thereafter. There is no evidence tending to show that Spencer otherwise improved it. There was possession by Spencer and inclosure of land north of an alley there, which was not the land in controversy; and this instruction imports that such inclosure upon that land, although he had no inclosure or improvement on the land in controversy, and no paper title, would still spread over the land in controversy,

whereas he could only hold by actual inclosure. And then it propounds two different periods of limitations, ten and fifteen years, because it goes on to say, "And kept the same inclosed for a period of 15 years," and afterwards says, "And claimed the same adversely for a period of more than 10 years before the institution of this suit." Now, which period did the court intend to tell the jury applied,—ten or fifteen years? One instruction must not be inconsistent with another. Much graver is the objection where it is inconsistent within itself. How can we say whether the jury acted on the ten year or the fifteen year period? We could not say, under that instruction, on which the jury acted; and an instruction capable of two constructions, one of which is erroneous and may mislead the jury, should not be given. *Gas Co. v. Wheeling*, 8 W. Va. 323, point 12; opinion in *McMechen v. McMechen*, 17 W. Va. 703; *Barnett v. Lumber Co.*, 43 W. Va. 441 (27 S. E. 209). Again, we may say this instruction is inconsistent with the fixed period of ten years in the substitute instruction for plaintiff's No. 1, and instructions must not be inconsistent with each other. A bad one is not cured by a good one. A bad instruction should be withdrawn. *McKelvey v. Railroad Co.*, 35 W. Va. 500 (14 S. E. 261). It is bad, too, in not defining adverse possession, and leading the jury to say that mere acts of ownership constitute adverse possession, without defining and explaining to the jury what kinds of acts of ownership, and under what circumstances they constitute adverse possession.

I cannot see that defendants' instruction No. 7 is bad. I do not see that a defendant who relies simply on possession under claim of title, without showing color, has to in any way particularize what his claim of title is, so he claim it in connection with possession.

The court gave, for defendants, instruction No. 8, that if Spencer acquired adverse possession to the premises shown in red on the plat, "in the manner defined in these instructions,"—that is, for fifteen years prior to 1861, or ten years since 1861,—then his failure to keep up his fences after his possession had so ripened into title will not constitute an abandonment of his right to so much of the land as remained inclosed, if he continuously remained on the premises which he had formerly inclosed. Now,

the red on the plat included certain lots north of an alley which Spencer unquestionably inclosed and resided upon, and included the lots in controversy south of that alley, which were not inclosed except in the manner above stated, and the inclosure of which ceased (with the very latest possible date, as claimed by the defendants) in 1860, while the possession of the lots north of the alley continued. This instruction would lead the jury to say that the continued occupation of those lots north of the alley would extend to the others, though there was no improvement thereon, and the fence had ceased to exist, and the inclosure never was such as to give adverse possession. It would give the defendants the benefit of the inclosure of other land, as to the land in controversy, and they were not entitled to the benefit of the inclosure of such other lands. And, again, no instruction defined adverse possession, though this instruction appealed to them for the manner of acquiring adverse possession. Then there was no evidence tending to show adverse possession by actual occupation for any time after 1861, and the instruction was foreign to the case as to that. The evidence fairly presented no such case, and this instruction fixed fifteen years as the limit prior to 1861, and it is inconsistent with the ten-year limit fixed by the substitute for the plaintiff's instruction No. 1. And what does it mean by saying, "If he continuously remained on the premises which he had formerly inclosed"? There is not a particle of evidence to show that Spencer, or any one for him, before this suit, lived a moment on the land in controversy, or improved it, or in any wise remained on it; and hence we must construe that language as meant to refer to other land north of the alley on which Spencer did remain, and which was inclosed,—different land from the land in controversy,—thus giving the defendants the benefit of possession of that land, although it was utterly vacant, fenceless, houseless, and without improvement. It is true that, after title has become perfected under the statute of limitations, then mere failure to keep inclosed is immaterial, for the party has good title without further continuous possession until he is deprived of it by some adversary possession. He cannot, however, abandon or discontinue his inclosure while the statute is running in his favor until the term fixed by it as

a bar shall have fully elapsed. The instruction was vague in some of its features, abstract in some, inconsistent with a former instruction, and misleading.

Therefore we reverse the judgment, set aside the verdict, and grant a new trial.

Reversed.

CHARLESTON.

SCOTT v. CHESAPEAKE & O. R. Co.

Submitted January 20, 1897—Decided April 24, 1897.

REVIEW ON APPEAL—*Weight of Evidence.*

The weight of the evidence is for the jury, and, unless it plainly preponderates against the verdict, it will not be disturbed. (p. 487.)

Error to Circuit Court, Kanawha county.

Action by George W. Scott against the Chesapeake & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error.

Affirmed.

SIMMS & ENSLOW and J. E. CHILTON, for plaintiff in error.

E. W. WILSON, for defendant in error.

DENT, JUDGE:

The Chesapeake & Ohio Railroad Company complains of a judgment for two hundred and fifty dollars rendered against it by the Circuit Court of Kanawha county at the suit of George W. Scott. The only witness personally introduced before the jury was the plaintiff, who testified: That on the 30th day of January, 1895, he purchased a round-trip ticket of the defendant, at Charleston, to Cincinnati and return, which is as follows: "Chesapeake & Ohio Railway Co. (One first-class passage.) Cincinnati, O., to Charleston, W. Va. Good returning only on trains Nos. 16 and 4, leaving Cincinnati at 7:40 A. M. and 7:00 P.

43	484
45	53
43	484
46	191
46	357
43	484
49	299
43	484
54	580
43	484
56	313

m., respectively, January 31st, 1895, and train No. 16, leaving Cincinnati at 7:40 a. m., February 1st, 1895. Not good for stop-over. Exc. 19. W. H. Fuller, General Passenger Agent. (4. Special Excursion.)” That he went to Cincinnati on that day, and stayed all night with his brother, and started to return the morning of the 31st,—the next day,—and missed the train. On the following morning he again went to the depot, with the intention of taking 7:40 A. M. train for home. He showed his ticket to the gateman, and passed in to where the train was standing, and went to get on the train, when the conductor or brakeman said to him: “The ticket ain’t no account. You can’t go on this train. Get out of the way.” He went into the ticket office, and showed it to the agent, and the agent said: “‘That’s all right. Go on and get on that train,’ he says, and I went back, and the gateman would not let me through. I brought the ticket on back to him, and he said he would go up and get General Ryan to extend the time. I took it to General Ryan [general passenger agent for the Chesapeake & Ohio Railroad], and he said he would let me have a ticket for \$4. And I told him that if he could not give it to me, or take it for its face value, I did not want a ticket at all; that it was a round-trip ticket and return. He said he would give me a ticket for \$4.” The usual fare is five dollars and fifteen cents. The reason he went to Gen. Ryan to have the time extended was because he had missed the train without his fault, on account of the servants of the company refusing to honor the ticket. He went back, and borrowed the money from his brother to buy a ticket, and the next day (February 2d) returned home. He denied telling any person that he missed the train on the 1st of February, but said he had remarked that he missed the train on the 31st, in the hearing of some strange women where his brother was staying.

The defendant introduced the depositions of three witnesses, Bertie Dole, Mary Hall, and Mary Ingram, whose testimony is to the effect that plaintiff told them, or remarked in their hearing, that he had missed the train on the 1st of February, 1895; also, the deposition of F. W. Lamberton, who says he was the conductor on the 7:40 A. M. train on the morning of the 1st February, 1895, and

that he did not prevent any one from getting on that train. Charles W. Thoburn, collector on the train, testified to the same effect. G. W. Mullins, brakeman on same train, testified to the same effect. A. W. Flowers and John McGrail testified that they were gate keepers at the depot the morning of February 1, 1895, and that they were the only two, and that neither of them prevented any one from passing through the gates on that morning because his ticket was not good, nor for any other reason. Also, Edgar Nornick, another gate keeper, testified to the same effect. These witnesses were not presented before the jury, nor submitted to cross-examination, and the jury were not afforded any opportunity of seeing them or hearing them testify. All of them, no doubt, testify to the best of their memories. Human memory is very treacherous, and, if they had been produced in court, by cross-examination their memories might have been refreshed. At least, the jury would have had a much better opportunity of judging of the truthfulness of their testimony. This was a risk the defendant must have decided to take, as it was fully able to produce its witnesses in court. It would have been good policy on the defendant's part also to have proven that such an occurrence did take place the morning of the 2d, when the ticket had expired, if it were possible to do so.

The depositions of these woman are hardly worth considering, for they testify that plaintiff said he missed the train the morning of the 1st, and that he went away the morning of the 2nd. This is, to some extent, corroborative of the plaintiff's testimony; for he did miss the train the morning of the 1st, and testified that he left for home the morning of the 2nd. The impression is endeavored to be produced that he missed the train for the reason that he was too late. This is not clear from the depositions, but he admits that he did miss the train for this reason the morning of the 31st January. Depositions of a doubtful nature, depending merely on questions of memory, have very little weight before a jury, and rightly so; for the very object of jury trials is to have, among other essential things, personal inspection and observation of the witnesses, including their mode and manner of testifying, under the supervision of the court and the rigid cross-exami-

nation of opposing counsel. The plaintiff was present, and submitted himself to the ordeal of a most rigid and searching cross-examination, in which able counsel used every lawful endeavor to impeach his testimony and prejudice him in the minds of the jury, from which he came out unscathed; and this fact may possibly have had the effect to increase the damages awarded, for jurors are oftentimes irritated by the unbearable and unjustifiable manner in which witnesses are sometimes unmercifully treated by censorious counsel. This, however, may not apply to this case, in any sense. But after the defendant has had the opportunity, but failed, to produce its witnesses in court, and the jury believe the witness produced before them, rather than the depositions of those not so produced, this Court could hardly be justified in holding the verdict to be contrary to the evidence. The jury heard the witness, and believed him, and refused to disregard his evidence, by reason of the uncertain testimony of those they did not hear. It is their province to weigh the testimony, and it is not for this Court to disturb their finding, sustained by the lower court, unless it is plainly contrary to the preponderance of the evidence. Every witness for the defendant may have sworn to what he honestly believed to be the truth, and yet the plaintiff's evidence be unimpeachable. How, then, can this Court disturb their verdict? Defendant claims that the plaintiff should not recover because he failed to produce his brother to corroborate him. The defendant failed to produce Gen. Ryan, general passenger agent, and the ticket agent, to contradict plaintiff. This is certainly an offset. The defendant says the ticket agent told him the ticket was good on that train, and when he missed it, by reason of the gate keeper refusing him admission, told him that he would get Gen. Ryan to extend it; but Gen. Ryan refused to do so, but told him he would sell him a ticket for four dollars. Neither of these witnesses is produced and the presumption is that they would corroborate plaintiff.

The defendant insists that the damages allowed are excessive, while the plaintiff insists that the damages are merely compensatory, according to the rule established in the cases of *Boster v. Railway Co.*, 36 W. Va. 318, (15 S. E. 158); *Sheets v. Railroad Co.*, 39 W. Va. 475, (20 S. E.

566); *Trice v. Railway Co.*, 40 W. Va. 271 (21 S. E. 1022)—but that this is plainly a case justifying punitive damages for the disregard on the part of the company of the duty it owes to the public. The verdict of the jury is in effect that the defendant induced the plaintiff to purchase a round-trip ticket from Charleston to Cincinnati and return, at the price of three dollars and twenty-five cents, and, after he had gone to Cincinnati, peremptorily refused to comply with its contract and carry him back unless he would pay the additional sum of four dollars which he did not possess, but fortunately had a brother in the city from whom he could borrow. This latter fact ought not to mitigate the damages allowable. The jury, no doubt, placed themselves in this man's situation, induced to travel almost two hundred miles from home on promise of free and certain return, and then left without means, in a strange city, to return as best he could, and seek a court of justice for redress. To turn such a suitor away with mere nominal damages would be adding insult to injury. Under such circumstances, following the cases above referred to, it cannot be said that the verdict of the jury was excessively harsh. With Mr. Sedgwick, I am inclined to think that in all similar cases, while the damages are styled "indeterminate and compensatory," they are disguised punitive damages, intended to operate as exemplary in their nature. In the case of *Mayer v. Frobe*, 40 W. Va. 246, (22 S. E. 58), this Court held that "in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct, or criminal indifference to civil obligations, affecting the rights of others, appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages." In *Sutherland on Damages* (volume 3, § 950) the rule is stated to be: "If a corporation like a railroad company is guilty of an act or default such as, in the case of an individual, would subject him to exemplary damages, it is equally liable thereto"; and "as the corporation can only act through natural persons, its officers and servants: and as it, of necessity, commits its trains or vehicles absolutely to the charge of persons of its own appointment; passengers, of necessity, commit to them their safety and comfort in *transitu*—the whole power and authority of the corpora-

tion *pro hac vice* is vested in such employes, and, as to such passengers, they are the corporation." In Webb's Pollock on Torts (page 220) the rule is stated to be, "To warrant a verdict for exemplary damages, it is necessary to prove either actual malice, wanton negligence, reckless conduct, or fraud." In the case of *Day v. Woodworth*, 13 How. 363, Mr. Justice Grier said: "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action and the damages inflicted by way of penalty or punishment given to the party injured." The true rule is given by Mr. Justice Gray in *Railway Co. v. Prentice*, 147 U. S. 101, (13 Sup.Ct.261 :) "The jury may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief, or criminal indifference to civil obligations." Was the defendant guilty of such conduct in this case? The defendant is a mere creature of the law, having neither mind nor conscience to be the subject of evil intent or misconduct. Hence the law visits upon and imputes to it the misconduct of its agents acting within the scope of their authority. The Constitution of this State (section 9, Art. XI) declares all railroads to be public highways, free to all persons for the transportation of their persons. Clause 9, s. 82c, c. 54, Code, provides "that all railroad corporations, whose lines of road shall extend into or through the State, and which extensions are incorporated under the laws of this State or any other State, or the United States, shall take and transport passengers and freight when offered." The mere refusal to accept a passenger when offered is made illegal. How much more illegal is it for a corporation to sell a passenger a ticket, and then, after getting his money, refuse to let him ride on it! And still more aggravated to sell him a round-trip ticket, carry him one way, and refuse to permit him to return unless he pay an increased sum. Is not this aggravated and oppressive misconduct, and criminal indifference to legal obligations affecting the rights of others? Would it not be denounced in an individual as an extortionate mode of getting money under a false pretense? Is it not a wrong in which the public is vitally interested?

One of the foundation stones of civil government is the protection of the weak against oppressive, willful conduct of the strong, and this is a principle that should be most rigidly enforced against powerful corporations who derive their existence and strength wholly from the government. The jury found the defendant guilty of willfully and wantonly refusing to allow the plaintiff to return on a ticket that it had induced him to buy. In the case of *Heirn v. M'Caughan*, 32 Miss. 1, the court held that the refusal to stop and take on a passenger was a public wrong, for which exemplary damages were allowable. And in the case of *Railroad Co. v. Hurst*, 36 Miss. 600, it was held that the jury was authorized to assess exemplary damages for the disregard of public duty against a railroad company for not allowing a passenger to get off at a station, but compelling him to leave the cars some distance therefrom. The object being, "in such cases to protect the public against the negligence, folly or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances." The defendant in this case did not attempt to excuse or palliate in any manner the conduct of its servants in willfully and wantonly, and with some degree of aggravation and insult, refusing to return the plaintiff to his destination, but simply relied on a denial of the whole occurrence. The jury, on such evidence as it had, found against the defendant. Railroads can not do such things with impunity, and they must compel their servants to submit to the law of the land. If not, the law must vindicate itself through its judicial tribunals, substantially rewarding the injured party who seeks its vindication and the preservation of its integrity; and, though the remedy may appear harsh, it is far better that individuals should suffer than that the law should be rendered impotent and ineffective to prevent lawlessness, oppression, and wrong. In submission to former adjudications of this Court, the judgment is affirmed.

NOTE BY BRANNON, JUDGE:

I do not wish to be understood, by concurring in this judgment, as concurring with so much of the opinion as holds that punitive damages can be awarded against a corporation, which is contrary to the decision of this Court in *Ricketts v. Railroad Co.* 33 W. Va. 433 (10 S. E. 801), and *Downey v. Railroad Co.*, 28 W. Va.

732. The question is foreign to this case; at least, not necessary to its decision. What would be my opinion on it as an original proposition, I do not know, as I have not examined.

Affirmed.

CHARLESTON.

SHUMATE'S EXECUTORS *v.* CROCKETT, *et al.*

Submitted January 27, 1897—Decided April 24, 1897.

1. **APPEAL—Limitation of Appeal.**

No error in a final or appealable decree will be considered upon an appeal not taken within two years from its date. (p. 492.)

2. **DECREE—Amendment of Decree—Motion.**

A mistake or misrecital of a sum in a decree will be corrected on motion after notice, under section 5, chapter 134, Code, 1891. (p. 494.)

3. **CONVENTION OF LIENS—Payments—Restatement of Liens.**

Payment of some of the debts included in a decree made on a commissioner's report convening liens, under section 7, chapter 139, Code 1891, in a suit by a judgment creditor for himself and other lienors, will not suspend its execution, or call for a rehearing or restatement of liens. (p. 493.)

4. **ENFORCEMENT OF LIENS—Payments—Parties.**

A suit to enforce liens, under section 7, chapter 139, Code 1891, by one judgment creditor, suing for himself and other lienors, will not be suspended by payment of the debt of the plaintiff after an order of reference. It may and will proceed in the name of the plaintiff, unless an order be made substituting another person as plaintiff. (p. 493.)

5. **PURCHASE PENDENTE LITE—Notice—Parties.**

Pendente lite purchasers need not be made parties. Where judgments are docketed or deed of trust recorded, or liens otherwise acquired, and a chancery suit to enforce same is pending, there need be no notice of the pendency of such chancery suit, under section 13, chapter 139, Code 1891, to bind purchasers purchasing after the docketing of such judgment or recordation of such deeds of trust or lien. They are *pendente lite* purchasers, under the common-law rule. (p. 493.)

43	491
45	671
48	491
48	476
43	491
49	11
43	491
51	154
43	491
60	603
43	491
66	374

Appeal from Circuit Court, Summers County.

A. Shumate's executors sue W. C. Crockett and others. Decree for plaintiffs. From an order refusing a rehearing, Crockett and others appeal.

Modified and affirmed.

HAYNES, ARBUCKLE & HEFLIN, for appellants.

J. H. MILLER, D. E. JOHNSON and S. L. FLOURNOY, for appellees.

BRANNON, JUDGE:

The executors of A. Shumate, deceased, judgment creditors of W. C. Crockett, suing for themselves and all other lien creditors, under section 7, chapter 139, Code 1891, filed a bill to enforce such liens against lands of Crockett, and also one debt secured by a deed of trust given by Crockett and Willie C., his wife; and, upon a commissioner's report ascertaining liens, the court pronounced a decree fixing liens, and directing a sale. This decree was May 13, 1891. In February, 1895, before sale, Crockett and wife filed an answer, asking that the case go back to a commissioner for restatement of liens in view of certain partial payments on debts decreed, and to expunge usury in one debt; and Willie C. Crockett filed a petition asking rehearing, and that Barclay and Bryan, trustees, and Doran, be made parties. And John G. Crockett and Willie C. Crockett filed a petition to rehear the decree. The court refused to rehear or recommit the report, or to continue the cause. It refused to receive the petition of John G. and Willie C. Crockett, and also refused to allow it to be withdrawn. W. C. Crockett, Willie C. Crockett, and John G. Crockett appeal.

We shall not consider any objections to the decree of May 13, 1891, because that decree, if not in full sense final, was appealable; and, as nearly four years had elapsed from its date to the date of the appeal, those questions are forever closed. *Buster v. Holland*, 27 W. Va. 510. This decree was such a final decree as to allow a bill of review. *Core v. Strickler*, 24 W. Va. 689. And three years, if not two, bar a bill of review.

Some considerations based on things taking place after

that decree are relied upon. Some payments were made on the debts, but on many no payments were made, and what was paid was a very inconsiderable fraction of the indebtedness decreed. Now, a reference had been made, and one statement of liens made. That complied with the law. Can a defendant, under these circumstances, demand a suspension of a decree fixing liens, and a reconvention of creditors from partial payments? If so, a debtor would have but to make partial payments to indefinitely postpone. Reflect that the court did make a reference, and on its report decreed liens. There was no uncertainty, then, as to liens or amounts. After partial payments could not render it indefinite as to the sum for which the land was to be sold, for the debtor knew what payments he had made, and the court would, if necessary, apply them by further proceedings. The debt of the plaintiffs was paid, but the suit was expressly for all lienors, and others had appeared, and become parties, and that payment could not defeat the decree. The decree belonged to all, not one, of the creditors, and any creditor yet unpaid had a right to enforce it. It could go on in the name of original plaintiffs, or, if anybody so asked, the plaintiff's name could be stricken out, and another creditor's name substituted; but what the use of this, unless the original creditor asked it so as to be relieved of fee bills? *Linsey v. McGannon*, 9 W. Va. 154; *Bilmyer v. Sherman*, 23 W. Va. 662.

As to the point that Barclay and Bryan and Doran were not made parties: After the commencement of this suit, Crockett and wife made a lease for years to Barclay, trustee, for the purpose of boring for oil; and they also made a deed of trust to Bryan, trustee, to secure Doran borrowed money, for which John G. Crockett was surety. Though these conveyances passed legal title, yet they were subsequent in time to the docketing of the judgments and registry of the deed of trust decreed as liens on the land; and section 13, chapter 139, Code 1891, did not require a notice of *lis pendens* of this suit, and it operated under the common-law rule of *lis pendens*, and those parties were *pendente lite* purchasers, and need not be made parties. They had, by construction of law, notice of both the liens and of this suit. *Harmon v. Byram*, 11 W. Va. 511; *Lynch v. Andrews*, 25 W. Va. 754; *Stout v. Mercantile Co.*,

41 W. Va. 339 (23 S. E. 571); *O'Connor v. Dils*, 43 W. Va. 54 (27 S. E. 363.)

There was in the decree what I shall call a clerical mistake. The commissioner reported a debt of B. Prince & Co. as ninety-six dollars and fifty-eight cents, and the decree, by mispunctuation, makes out of the same figures a debt of nine thousand six hundred and fifty-eight dollars, a signal instance of the power of punctuation, especially if, as claimed, it be good ground on this appeal, if it were in time, for the reversal of the whole decree. The petition of Willie C. Crockett, as I interpret it, assigned this as a ground of rehearing. This is, under section 5, chapter 134, Code 1891, a mistake or misrecital of a sum, and the decree is amendable by the commissioners' report within five years. This petition is good to correct that error. *Crumlish v. Railroad Co.*, 28 W. Va. 627; *Martin v. Smith*, 25 W. Va. 583; *Triplett v. Lake*, 43 W. Va. 428. The only question is that said section requires notice to the party to be affected by the amendment. The want of it is the only impediment in the way in saying the court below ought to have amended the decree in this particular respect under that petition. If the decree were interlocutory or not appealable, so we could treat the petition as one for rehearing, we could dispense with notice; but, as it is, we have to regard the petition as a bill of review, requiring process. No one appeared to this petition but the Bank of Princeton. But counsel representing creditors disavow in this Court all idea of claiming more for Prince & Co. than ninety-six dollars and fifty-eight cents under the decree, saying it was merely a clerical misprision; and, as it ought to be corrected, we will amend the decree in that point, and affirm it as so amended.

Modified and affirmed.

CHARLESTON.

STATE v. GOETZE.

Submitted February 6, 1897—Decided April 24, 1897.

1. CIGARETTES—*Original Package—License—Interstate Commerce.*

Cigarettes manufactured in another state, and imported into this State in the original package, may be sold in such original package; and the act of the legislature of West Virginia, passed February 21, 1895, amending and re-enacting the Code, c. 32, s. 66, so as to provide that a certain license fee shall be paid for selling cigarettes at retail, so far as it applies to cigarettes so imported and sold by the importer in West Virginia, is not an exercise of the police power of the State, but a regulation of interstate commerce, and therefore void. (p. 499.)

2. CIGARETTES—*Original Package.*

Where cigarettes are manufactured in a sister state, and placed in paper boxes for convenience of transportation and sale, and such boxes are provided with a proper label, giving the name of the cigarettes, the caution notice, the number of the factory, the number of the revenue district, the name of the state in which they are manufactured, and the proper internal revenue stamp, duly canceled, is pasted across the end of such package so as to seal the same, in accordance with the requirements of the act of congress and the internal revenue laws governing the packing, shipment, and sale of cigarettes, such paper box must be regarded as an original package; and its character will not be changed by its being placed, with other boxes of the same kind, in a wooden box for shipment. (p. 497.)

Error to Circuit Court, Ohio County.

Charles Goetze was convicted of selling cigarettes without a license. The circuit court reversed the judgment, and the State brings error.

Affirmed.

JOHN A. HOWARD and T. S. RILEY, ATTORNEY GENERAL, for the State.

S. G. SMITH and W. W. FULLER, for defendant in error.

ENGLISH, PRESIDENT :

On the 3d. of September, 1895, Charles Goetze was indicted in the Criminal Court of Ohio county for selling without a license paper-wrapper cigarettes, in violation of chapter 11 of the Acts of 1895. On the 18th day of November, 1895, the defendant was tried upon said indictment, convicted, and judgment entered against him for the payment of a fine of ten dollars and costs of prosecution. The defendant obtained a writ of error to the Circuit Court of Ohio county, and on the 23d of June, 1896, the circuit court reversed the judgment of said criminal court, and held that the act of the legislature referred to was unconstitutional, and dismissed the prosecution against the defendant. It appears from the record that the defendant admits the sale as charged in the indictment, but contends that he had a right to make such sale, for the reason that the act referred to interfered with interstate commerce, and was therefore unconstitutional. From the judgment of the circuit court the State of West Virginia applied for and obtained this writ of error, assigning the following errors: First, that the circuit court erred in holding that the act of the legislature referred to is unconstitutional, and by reason thereof the defendant was not guilty as charged and convicted in the criminal court; secondly, that the circuit court erred in setting aside, reversing and annulling the judgment of the criminal court, and dismissing the prosecution,—contending that, if the criminal court had erred in its judgment, all the circuit court could do would be to reverse the judgment of the court below and send the case back for a new trial.

The facts of this case, as appears from the record and the agreement of counsel, are that the defendant, Charles Goetze, was on August 31, 1895, doing business as a druggist in the city of Wheeling, Ohio county, W. Va., and that he purchased from the American Tobacco Company (a corporation organized under the laws of the state of New Jersey, having a factory for the manufacture of cigarettes in the state of New York and in other states, but having none in the State of West Virginia) a consignment of cigarettes, which were packed in a large wooden box, which box contained a number of smaller paper boxes, each of which paper boxes contained ten cigarettes, which

cigarettes were known as "Sweet Caporal" and "Virginia Brights," the names being indorsed on the packages, and the proper revenue stamp affixed thereto; that the packages of cigarettes were not unpacked from the wooden case, except as they were handed out to purchasers in the paper packages of ten above described; that on the 31st day of August, 1895, the defendant sold to one William Bell two of said paper packages, at his drug store aforesaid, taking the same, at the time of sale, from said large box.

It is disclosed by the testimony and admissions of counsel that the defendant purchased the cigarettes in question from the American Tobacco Company, a New Jersey corporation doing business in New York, and that said cigarettes were packed in boxes, each containing ten, which boxes were properly indorsed and stamped as required by law, and that said paper boxes, for convenience of shipment, were packed in a wooden box, and shipped therein directly from the American Tobacco Company in New York, to the defendant, in the city of Wheeling, and after the wooden box was opened said cigarettes were sold in the paper boxes as they came from the factory, each containing ten, and not one cigarette at a time, as other cigars are sold by retail. In other words, they were sold by the box, and not by the cigarette. Were they sold by the original package, or should the defendant have sold the entire contents of the wooden box, without opening the same, in order to constitute the sale by the original package? We cannot say the wooden box constituted the original package, any more than we would say, if these paper boxes had been wrapped in thick paper and tied with twine, or packed in a barrel, for convenience in shipping, that the paper parcel or the barrel should be considered the original package. As the cigarettes came from the hands of the manufacturer, they were in paper boxes, each containing ten, for the convenience of their customers; and, whether they sold one box or a thousand, these paper boxes must be regarded as original packages. These packages, as before stated, had upon them the label giving the name of the cigarettes, the caution notice, the number of the factory, the number of the revenue district, the name of the state in which they were

manufactured, the name of the manufacturer, and the internal revenue stamp for ten cigarettes, duly canceled, pasted across the end of each package, so as to seal the same, in accordance with the requirements of the act of congress and the internal revenue laws governing the packing, shipment, and sale of cigarettes, all of which is required by law to constitute a package of cigarettes ready for shipment and sale; and, when these things are done, the package may be regarded as an original package. None of this indorsement or stamping is required to be placed upon the pine box or barrel or paper parcels in which these packages might be shipped, and opening the box, barrel, or parcel for the purpose of taking out the paper boxes cannot be considered as breaking the original package. These packages are, moreover, required to be put up in this particular manner by the act of congress, and a penalty is prescribed for a failure so to do. Rev. St. § 3392, contains the following provision, to wit: "That every manufacturer of cigarettes shall put up all the cigarettes that he either manufactures or has made for him, and sells or removes for consumption or use, in packages or parcels, containing ten, twenty, fifty, or one hundred cigarettes each, and shall securely affix to each of said packages or parcels a suitable stamp denoting the tax thereon, and shall properly cancel the same prior to such sale or removal for consumption or use under such regulations as the commissioner of internal revenue shall prescribe." And section 3381 of said Revised Statutes, on the same subject, provides that "he shall neither sell nor offer for sale any tobacco, snuff, or cigars, except in original or full packages, as the law requires the same to be prepared and put up by the manufacturer for sale, or for removal for sale or consumption, and except such packages of tobacco, snuff and cigars as bear the manufacturer's label or caution notice and his legal marks and brands and genuine internal revenue stamps which had never been used."

This must be regarded as a federal question, and in consequence we must look to the federal decisions for precedents which shall control our conclusion. The identical question presented in this case was passed upon in the United States circuit court for the district of West Virginia *in re* Minor, reported in 69 Fed. 233, and it was

there held that "the act of West Virginia (Feb. 21, 1895) amending and re-enacting Code, c. 32, s. 66, so as to provide that a certain license fee shall be paid for selling cigarettes at retail, so far as it applies to cigarettes imported from another state and sold by the importer in West Virginia in the original package, and to cigarettes manufactured in another state, and by the manufacturer sent into West Virginia in the original package for sale by the agent of the manufacturer, and so sold in such package by such agent, is not an exercise of the police power of the state, but a regulation of interstate commerce, and therefore void." Goff, J., in his opinion in that case, on page 235, says: "The rule now well established is clearly stated by Mr. Justice Field in *Bowman v. Railroad Co.*, 125 U. S. 465, 507 (8 Sup. Ct. 689), in these words: 'Where the subject upon which congress can act under its commercial power is local in its nature or sphere of operations, such as harbor pilotage, the improvement of harbors, the establishments of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, erection of walls, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, congress can alone act upon and provide the needed regulations.' It follows that if congress has not legislated on any special subject relating to commerce, and the enactments of a state regarding the same are questioned, the only matter to be determined by the courts is, does the state legislation complained of amount to a regulation of commerce? If so, it is unconstitutional and void." Judge Goff, in his opinion, also says: "The argument submitted by counsel for the state, that the legislation by virtue of which the petitioner was arrested is but the proper exercise by the state of its police power, is, I think, without merit. That which does not belong to commerce may be regulated by the state, under its police power, but that which does belong to commerce falls within

the exclusive control of the United States. This act of the West Virginia legislature inhibits the sale by the petitioner (unless he first pays a tax for the privilege so to do) of the original packages of cigarettes imported by him into the State of West Virginia from the State of New York while they are still articles of commerce, and this demonstrates by the authorities I have referred to that it is not a proper use of the police power."

In the case of *Leisy v. Hardin*, reported in 135 U. S. 100 (10 Sup. Ct. 681), which was taken to the supreme court of the United States from the State of Iowa, the syllabus reads as follows: "A statute of a state prohibiting the sale of any intoxicating liquors except for pharmaceutical purposes, medicinal, chemical, or sacramental purposes, and under a license from a county court of a state, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the constitution granting to congress the power to regulate commerce with foreign nations and among the several states." In that case the marshal of the city of Keokuk, under the statute of the state, had seized a number of barrels of beer, and eleven sealed cases of beer, which had been manufactured by Leisy & Co. in the state of Illinois, each of which kegs or barrels had placed upon it over the plug in the opening of each keg a United States internal revenue stamp of the district in which Peoria is situated. Said cases were substantially made of wood, each one of them containing twenty-four quart bottles of beer, each bottle of beer corked, and the cork fastened in with a metallic cap sealed and covered with tin foil and each case was sealed with a metallic seal. That said beer in all of the said kegs and cases was manufactured and put up into said kegs and cases by the manufacturers, Leisy & Co., and to open said cases the metallic seals had to be broken. That the property above described was transported by Leisy & Co. from Peoria, Ill., by rail, to Keokuk, Iowa, in said sealed kegs and cases, and was offered for sale by John Leisy, a resident of Keokuk, Iowa, who was agent for Leisy & Co., in the original keg and sealed case, as manufactured and put up by Leisy & Co., and transported by

them into the state of Iowa. An action of replevin was brought against said marshal to recover said property, which was decided in the state court in favor of the plaintiff, which decision was affirmed by the Supreme Court of Iowa, and was then taken to the supreme court of the United States, where the opinion of the court was delivered by Justice Matthews, who, after going into an exhaustive review of the subject, and citing numerous authorities in support of his position, concluded as follows: "The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages as described. Under our decision in *Borman v. Railway Co.*, 125 U. S. 507 (8 Sup. Ct. 689), they had the right to import this beer into that state; and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which congress recognizes as subjects of inter-state commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character, although at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States represented in congress, and its possession by the latter was considered essential to that more perfect union which the constitution was adopted to create." This question has frequently been before the courts of the different states and the Su-

preme Court of the United States, and other cases might be cited in full accord with the decisions we have quoted, but it is regarded as unnecessary for the determination of the case we are now considering. Having arrived at the conclusion that the packages of cigarettes sold by the defendant in this case were original packages, and the evidence showing that they were sold as they came from the manufacturer, without being broken, my conclusion is that the act of February 21, 1895, was not an exercise of the police power of the State, so far as it applies to the facts shown by the testimony in this cause, but a regulation of inter-state commerce, and therefore void; and the criminal court erred in overruling the defendant's demurrer to the evidence, and entering judgment against him. The judgment of the circuit court is therefore affirmed.

Affirmed.

CHARLESTON.

DILLON BEEBE'S SON v. EAKLE.

Submitted January 29, 1897—Decided April 28, 1897.

1. ASSUMPSIT—Written Contract—Recoupment of Damages.

In an action of *assumpsit* based upon a written contract, the defense to which is that the same was procured by fraud and misrepresentation, going to the whole action, the doctrine of recoupment of damages is not applicable. (p. 512.)

2. PLEADING—Non-Assumpsit—Error.

While a special plea, setting forth matters in discharge of the action, may be filed when the plea of *non-assumpsit* has been filed, yet, when the matters set up in said plea may be given in evidence under the general issue, it is not error to reject such plea. (p. 511.)

Error to Circuit Court, Braxton County.

Action by Dillion Beebe's Son against J. E. Eakle. Verdict for plaintiff, and from the judgment defendant brings error.

Reversed.

48	502
47	429
43	502
66	347

LINN & BYRNE, for plaintiff in error.

W. E. HAYMOND, for defendant in error.

McWHORTER, JUDGE :

This is an action of *assumpsit*, brought by Dillon Beebe's Son in the Circuit Court of Braxton County, against J. E. Eakle, founded upon the following paper writing: "*Eakle & Coffindaffer v. Dillon Beebe's Son*. In *assumpsit* in the Circuit Court of Braxton county. Received 23rd March, 1894, of Dillon Beebe's Son nine hundred and twenty-two dollars and seventy-one cents (\$922.71), in settlement in full of all balance on account of sawing, work, and account of every kind and character growing out of the contract between said Dillon Beebe's Son and said Eakle & Coffindaffer, dated 8th October, 1892, and all matters involved in above-styled action, and said action to be dismissed without costs agreed. And whereas the firm of Jack & Carper has set up certain claims to a part of the fund or account to be paid by said Dillon Beebe's Son on account of the work mentioned in said contract, by suggestion before G. S. Berry, justice; and W. H. Lee claims a right to a certain part of said amount on account of an order from said Coffindaffer to said Dillon Beebe's Son; and one J. B. Fowler has an action pending in said court against Dillon Beebe's Son, in which he claims certain amounts on account of certain orders of said Coffindaffer on said Dillon Beebe's Son, on account of said fund from said contract, and this amount so received leaving nothing on account of said contract or otherwise in said Dillon Beebe's Son's hands out of which to pay any part or either of said claims: It is hereby agreed that said Dillon Beebe's Son shall not in any manner be held liable therefor, and the undersigned hereby indemnify said Dillon Beebe's Son against each and all of said claims to the extent of said nine hundred and twenty-two dollars and seventy-one cents, in so far as they depend upon the orders of said Geo. W. Coffindaffer and the effect thereof upon the said fund. [Signed] J. E. Eakle, for the late firm of Eakle & Coffindaffer." The declaration avers that by reason of judgments of Justice G. S. Berry in favor of W. H. Lee, for eighty-seven dollars and seven cents, and in favor of Jack & Carper, for

one hundred and ninety-four dollars and ninety-five cents, and a judgment of Braxton circuit court in favor of James B. Fowler, for five hundred and thirty-seven dollars and forty-eight cents, plaintiff was compelled to pay, and did pay, the amounts of said several judgments on account of the claims set out in said writing sued upon; that said sums so paid by plaintiff to Jack & Carper, W. H. Lee, and James B. Fowler were not, nor was any part thereof, for any debt or demand of any kind or character due from the plaintiff to them, but was wholly on account of the transaction, orders, and claims against the said fund arising from the said contract between the plaintiff and said Eakle and Coffindaffer, as to each the said indemnity of the said defendant extends and applies; and so plaintiff says that said defendant, by said writing, did promise to pay to the plaintiff the said sum so by him paid out to the said Fowler, Lee, and Jack & Carper, whenever plaintiff should be made liable therefor. The declaration contained a second count, averring the pendency of an action of *assumpsit* in the circuit court of Braxton county, in which Eakle & Coffindaffer were plaintiffs, and said Beebe was defendant, for certain sawing and other work done by Eakle & Coffindaffer for Beebe under contract of October 8, 1892, and also the pendency of a proceeding before G. S. Berry, justice, in which Jack & Carper were plaintiffs, and said Beebe defendant, seeking to make defendant Beebe liable as garnishee to the payment of a certain claim of Jack & Carper against G. W. Coffindaffer, who was a member of the firm of Eakle & Coffindaffer, on account of the fund arising from the said sawing and other work done under the said contract of October 8, 1892; and that there was also pending in said circuit court on the 23d of March, 1894, an action of *assumpsit*, in which James B. Fowler was plaintiff, and said Beebe was defendant, which action was based upon certain orders of G. W. Coffindaffer, drawn on said Beebe, in favor of said Fowler and others, and transferred to said Fowler, which orders were upon the fund arising from the said contract of October 8, 1892, for sawing; and that one W. H. Lee, on the said 23d March, 1894, held a certain order of G. W. Coffindaffer against plaintiff on account of said fund; and that on the 23d of March the said J. E. Eakle represented to plaintiff that he had a

right to collect and receive such balances due from plaintiff to Eakle & Coffindaffer on account of the sawing and other work done under said contract between them and plaintiff; and that the said claims of Jack & Carper, Lee, and Fowler were not proper claims upon said funds; and that they had no right to receive anything upon account thereof; and that thereupon plaintiff, upon said date, paid and settled to the said John E. Eakle the sum of nine hundred and twenty-two dollars and seventy-one cents, being in full of all balances on account of sawing and other work and account of every kind and character growing out of the contract between said Eakle and Coffindaffer, and thereupon defendant, Eakle, executed the paper here sued upon, of date March 23, 1894; and then avers that he was afterwards compelled to pay the said several sums, *etc.*, and averring that all said sums by him so paid to Jack & Carper and Fowler and Lee were on account of debts and claims against the fund arising from the contract of October 8, 1892, and no part thereof on account of any debt or liability of the plaintiff to the parties to whom such debts were so paid; and that by reason of the receipt of the said amount of nine hundred and twenty-two dollars and seventy-one cents by the said defendant, on account of the said fund arising from said contract of October 8th, and his promise to indemnify as aforesaid, said defendant became and was liable to plaintiff for the said several sums so paid to Jack & Carper and Lee and Fowler, at least to the extent of nine hundred and twenty-two dollars and seventy-one cents, *etc.* On the 15th day of December, 1894, defendant pleaded the general issue of *non-assumpsit*, and at the same time tendered his specifications of set-off and four special pleas, marked, respectively, "Special Plea No. 1," "Plea No. 2," "Plea No. 3," and "Plea No. 4," and also a notice of recoupment, to the filing of which set-off, notice of recoupment, and pleas, and each of them, the plaintiff objected, and the court sustained the objection to each of said pleas and to said notice of recoupment, and to all of the items named in the set-off, except the item therein alleging a mistake in settlement. And said pleadings so objected to (with the exception aforesaid) were rejected, and said set-offs, so far as relates to the alleged mistake only, were filed, to which rulings of the court, reject-

ing said set-offs (with the exception aforesaid), notice of recoupment, and said several pleas, defendant excepted, and tendered his bill of exceptions. And on April 23, 1895, a jury was impaneled, and on April 24th, having fully heard the evidence and arguments of counsel, rendered their verdict for plaintiff for five hundred and ninety-six dollars and five cents, which was entered of record; and on the 1st day of May, 1895, defendant moved the court to set aside the verdict of the jury, and grant him a new trial, because the said verdict is contrary to the law and the evidence, and because of the several matters set forth in his bill of exceptions, which motion the court overruled, and entered judgment on said verdict.

Plea No. 4 tendered by defendant is as follows:

“And the said defendant, for further plea in this behalf, says that, before the execution of the writing set forth in the plaintiff's declaration, a contract had been entered into between this defendant and one George W. Coffindaffer, in the words and figures following, to wit: ‘This contract, made this 13th day of February, 1893, between John E. Eakle, of the first part, and G. W. Coffindaffer, of the second part, both of the county of Braxton and State of West Virginia, witnesseth: That on the 24th of August, 1892, by a written contract of that date between the parties hereto, said Eakle sold said Coffindaffer, on the terms mentioned therein, one-half interest in a certain sawmill, and said Coffindaffer agrees to pay him therefor \$600, to be paid as follows: Said Coffindaffer was to settle with said Eakle every 30 days, and pay him 50 cents for every thousand feet of lumber sawed, to be applied as a credit on said debt. This writing further witnesseth that said Eakle has rented to the said Coffindaffer the other half interest in said mill for the term of one year, and the said Coffindaffer agrees to pay, as rent therefor, sixty-two and one-half cents on every one thousand feet sawed, and agrees to pay the 50 cents above mentioned also on every thousand feet of lumber sawed, to be paid as follows: Said parties are to make settlement every 30 days, and said Coffindaffer agrees to leave, in the hands of the party for whom he saws, the above amounts, 75 cents on the thousand and of which is to be paid at the end of every thirty days, 37½ cents on the thousand, the residue, to be paid when

the amount which is reserved by the party for whom the said Coffindaffer may be sawing is due and payable, but, if no payment is reserved as aforesaid, then all of the \$1.12½ on the thousand is to be paid at the end of every thirty days, and, if as much as 37½ cents on the thousand is not reserved, then all of the \$1.12½ on the thousand must be paid, except the amount so reserved. Said Coffindaffer agrees to run said mill constantly and faithfully until said debt of \$600 is paid, and during said year, unavoidable accidents and events excepted, and to keep said mill in good repair, and return in as good condition as when he received it, ordinary wear and tear excepted. The failure on the part of the said Coffindaffer to pay the \$1.12½ on the thousand above mentioned, at the time and as above set out, or to run said mill constantly and faithfully, as above mentioned, or his failure to pay any of the above agreement, renders his rights under the contract and the prior contract of sale above mentioned null and void, and shall for such failure be rescinded. Witness the following signatures and seals. J. E. Eakle. [Seal.] George W. Coffindaffer. [Seal.] Which said agreement was duly acknowledged on the 13th day of February, 1893, before a notary of Braxton county, by the parties thereto, and was on the 6th day of March, 1893, duly admitted to record in the office of the clerk of the county court of Braxton County. And the defendant avers that on the 8th day of October, 1892, an agreement in writing was entered into between this defendant and George W. Coffindaffer, of the one part, and the plaintiff, of the other part, whereby the defendant and the said Coffindaffer, by the firm name of Eakle & Coffindaffer, agreed to do certain sawing and work for the said plaintiff, and in pursuance of which agreement there had become due and payable from the said plaintiff, before the 23d day of March, 1894, and for a long time prior thereto, a large sum of money, to wit, \$1,593.15, on account of the sawing and work done in the declaration mentioned, all of which sawing and work were done under and in pursuance of the contract last mentioned; and the amount which had become due as aforesaid was the balance due from said plaintiff after allowing him credit for such sums as he had paid, and was entitled to credit for, on account of said contract. And

the defendant avers that the said George W. Coffindaffer, to provide for the payment of the amount mentioned in the contract of February 13, 1893, to wit, \$1.12½ per thousand and for each thousand feet he should saw as therein provided, on the 18th day of February, 1893, drew an order upon the said plaintiff in the words and figures following, to wit: 'Dillon Beebe's Son: It is agreed between G. W. Coffindaffer and J. E. Eakle that certain amounts mentioned in the contract between them is to be retained by you, and paid to the said Eakle; and you are hereby directed to reserve said amounts, and pay to the said Eakle. Certain other amounts of money are agreed to be reserved by you, and paid to him as aforesaid, amounts of which will hereafter be furnished you, and are to be paid out of the amount reserved by you on said sawing. This 18th day of February, 1893. George W. Coffindaffer,'—and delivered the same to this defendant, whereby this defendant became and was entitled to have and demand of and from the said plaintiff one dollar and twelve and one-half cents per thousand thereafter sawed by said Coffindaffer under the contract of the 8th of October, 1892, hereinbefore referred to, and also certain other amounts for which orders were to be hereafter drawn as stipulated in the said last mentioned order.

"And the defendant avers that the plaintiff, to-wit, on the 13th day of February, 1893, had notice of the contract of that date between this defendant and said Coffindaffer, hereinbefore set out; and that the plaintiff, to-wit, on the 18th day of February, 1893, had notice of the order of that date drawn on him by said George W. Coffindaffer, and hereinbefore set out, and agreed and promised to pay, reserve, and pay to this defendant the amounts therein mentioned. And the defendant avers that afterwards, to-wit, on the — day of November, 1893, and in pursuance of the order of the 18th of February, 1893, aforesaid, the said George W. Coffindaffer drew an order upon the plaintiff, directing him to pay this defendant the sum of \$578.71, which amount represented the 'certain other amounts' in the order of February 18, 1893, aforesaid, to be reserved by the plaintiff, and paid to this defendant, of which last-mentioned order the plaintiff, to-wit, on the — day of November, 1893, had notice, and the plaintiff then and

there promised to pay the same; and this defendant avers that, on account of the orders so drawn by the said George W. Coffindaffer on the plaintiff, this defendant became and was entitled to demand and receive of and from the said plaintiff a large sum of money, to-wit, \$1,593.15, and that the plaintiff, to-wit, at various times after the said orders were drawn, and before the 23d day of March, 1894, in consideration of his indebtedness, which this defendant avers then existed on account of sawing and work done for him under his contract, aforesaid, with Eakle & Coffindaffer, promised to pay the defendant the amount which had become due and payable to him as aforesaid, to-wit, the said sum of \$1,593.15, which amount was due and payable to this defendant at the time of the making and delivering of the writing signed by this defendant, a copy of which is contained in the plaintiff's declaration, and to recover which a suit had been instituted in the Circuit Court of Braxton County by the said George W. Coffindaffer and this defendant against the plaintiff, and the same was pending and undetermined at the time this defendant signed and delivered to the plaintiff the writing so set out in said declaration. And the defendant avers that before and at the time of the making and delivery of the writing dated March 23, 1894, set out in the said declaration, the plaintiff falsely and fraudulently, and for the purpose of inducing this defendant to execute and deliver the said writing, represented to this defendant that no judgment had been entered in the proceedings before G. S. Berry, justice, in favor of Jack & Carper, referred to in said writing; and that said Jack & Carper were not entitled to recover from him (the said plaintiff) the amount of their said claim, for which said proceeding before said justice had been instituted; and that their said claim was founded upon orders drawn by said G. W. Coffindaffer upon the plaintiff, for moneys due or to become due from the plaintiff on account of the contract of November 8, 1892, aforesaid; and that the claims of said Fowler and the said Lee, referred to in the said writing, were likewise founded upon orders drawn by said G. W. Coffindaffer upon the plaintiff for moneys due and to become due upon the said contract last mentioned; and that the said plaintiff had not accepted the said orders, or any of them, orally or in

writing, and was in no wise liable by any act or acceptance of his, or on account of any agreement on his part to pay the said orders, or any of them, or any part thereof.

"And the defendant avers that, in truth and in fact, as the plaintiff well knew, a judgment had been rendered by the said G. S. Berry, justice, in the proceedings aforesaid, in favor of Jack & Carper, against the plaintiff, and that the plaintiff had, as he then well knew, accepted the orders in favor of the said Fowler and the said Lee, and each of them respectively, and had in fact, as he well knew, become liable by original undertakings and promises, and by acts and conduct then unknown to this defendant, and by the plaintiff fraudulently concealed from this defendant, to pay the several sums so claimed by Jack & Carper, Fowler, and Lee, respectively. And this defendant avers that the said G. W. Coffindaffer had no authority to draw the orders upon the plaintiff referred to in the writing signed by this defendant and in the declaration set out, upon which the respective claims of Jack & Carper, Fowler, and Lee were founded; and that this defendant relied upon the false and fraudulent representations so made as aforesaid by the said plaintiff, and did not know that the same or any of them were false, as in fact they were; and by means of said false and fraudulent representations this defendant was induced, and did, execute and deliver a writing of 23d March, 1894, set out in the declaration, to the plaintiff; and, but for said false and fraudulent representations, this defendant avers that he would not have so executed and so delivered the said writing. And the defendant avers that, by reason of the said false and fraudulent representations so made as aforesaid by the said plaintiff, the consideration for the execution of the said writing and the compromise of the suit therein mentioned has wholly failed, and the defendant has sustained damages amounting to a large sum, to-wit, \$1,593.15, and here offers to set off so much thereof as is sufficient to meet the demands of the plaintiff, and for the residue asks judgment against the said plaintiff. And this he is ready to verify. James B. Fowler, Linn & Byrne, Dulin & Hall, P. D.

"State of West Virginia, Braxton County, to-wit: J. E. Eakle, the defendant named in the foregoing plea, being first duly sworn, upon his oath says that the facts and alle-

gations contained in the foregoing plea are true; except so far as they are therein stated to be on information, he believes them to be true. J. E. Eakle.

"Taken, subscribed, and sworn to before me, this the 13th day of December, 1894. C. T. Byrne, Notary."

Pleas Nos. 1 and 2 are of about the same import, while No. 3 only goes to the claim of Jack & Carper.

"Said special pleas, so far as they contain defense to the action, in effect only amount to the general issue. And the matters sought to be set up in the said pleas as defense, so far as they are good, if sufficiently pleaded, could be given in evidence on the plea of *non-assumpsit*. It is not error to reject a special plea setting up matters in defense to the action, when the plea of *non-assumpsit* is filed, and the matter of defense of such plea may be given in evidence under the plea of *non-assumpsit*." *Hale v. Land Co.*, 11 W. Va. 229, 236; *Railroad Co. v. Lafferty*, 14 Grat. 478; *Railroad Co. v. Polly*, *Id.* 454. "When fraud is intended to be set up as a defense, it may be given in evidence under the general issue in *assumpsit*." 2 Saund. Pl. & Ev. top page 25, side page 527. Recoupment is said to be "that right of the defendant in the same action to claim damages from the plaintiff, either because he has not complied with some cross obligation of the contract upon which he sues, or because he has violated some duty which the law imposes upon him in the making or performance of that contract." *McAllister v. Reab*, 4 Wend. 483; *Id.*, 8 Wend. 109; *Allaire Works v. Guion*, 10 Barb. 55, and other cases cited. "In England, as well as in some of the United States, the principles of recoupment, as defined by us, have been recognized only in a restricted form. Under the name of reduction of damages, the defendant is allowed to show all such violations of his contract by the plaintiff as go to render the consideration less valuable; but he is compelled to resort to an independent action for any immediate or consequential damages affecting him in other respects." "The damages recouped must be for a breach of the same contract upon which suit is brought." *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Spalding v. Vandercook*, 2 Wend. 431; *Deming v. Kemp*, 4 Sandf. 147; *Miles v. Elkin*, 10 Ind. 329. And in *The Wellsville v. Geisse*, 3 Ohio St. 333: "Recoupment, however, even as

enlarged in its meaning by modern usage, signifying nothing more than a reduction of damages, the right can not be exercised under a plea the office of which is to set up a complete bar."

The defense attempted to be set up in this cause goes to the whole action, and alleges the procurement of the contract by fraud and deceit, which, if well proven, defeats the action. A recoupment of damages therefore is not applicable, so that the court did not err in refusing to file the said four special pleas and set-offs, but properly filed the set-offs as to the alleged mistake. The defense in this case not being based on a violation of a contract, but upon the procurement of the contract by fraud and misrepresentations, the settlement should not be opened except to correct mistake.

The third assignment is that "the court erred in limiting the evidence introduced by the petitioner as shown by the bill of exceptions No. 3." The court did not err in so limiting the effect of said evidence so introduced as to show a mistake in the settlement, as alleged in the notice of set-offs, and so far as they tend to prove that J. E. Eakle was entitled to amount due from Dillon Beebe's Son to Eakle & Coffindaffer.

The second assignment is that "the court erred in rejecting the evidence offered by the petitioner, as shown by bill of exceptions No. 4." The bill of exceptions No. 4 shows that on the trial defendant offered to prove the several matters of defense set up in the special pleas, to the introduction of all of which testimony plaintiff objected, and the court sustained the objection, and refused to admit in evidence the several matters of defense aforesaid. The court erred in rejecting any evidence offered by the appellant, as shown in said bill of exceptions No. 4, in so far as such evidence might tend to prove the procurement of the contract sued upon in this case by the plaintiff by false and fraudulent representations, as such evidence was admissible under the general issue. It follows, therefore, that the fourth assignment is well taken, that the court should have set aside the verdict of the jury, and granted a new trial. For the reasons stated, the judgment complained of is reversed, and the case remanded for a new trial to be had therein.

Reversed.

CHARLESTON.

FOLEY *et al.* v. RULEY *et al.*

Submitted February 8, 1897—Decided April 28, 1897.

1. EQUITY PLEADING—*Plea in Abatement—Error.*

A plea in abatement, though in a chancery suit by one judgment creditor for himself and all lienors, may be withdrawn by the defendant filing it, and another defendant can not avail himself of it nor rely on its withdrawal as error. (p. 514.)

2. EQUITY PRACTICE—*Summons.*

A summons commencing a suit may issue on, be returnable to, and be served on, the same first Monday in a month, if rule day. (p. 514.)

3. JUDGMENT LIENS—*Enforcement of Judgment Liens—Suits Pending.*

When a suit under section 7, chapter 139, Code 1891, has been begun by one judgment creditor for himself and all other lienors to enforce the lien of a judgment on land, no other lien holder can sue for the same purpose. If he does, the pendency of the first suit may be pleaded in bar and dismissal of the second suit. (p. 515.)

4. EQUITY PLEADING—*Demurrer—Answer—Order of Reference.*

When a demurrer to a bill is overruled, a time reasonable under the circumstances of the case must be given for answer; but when a time is fixed, objection to its shortness must be made, else the point is waived. A mere order of reference, deciding nothing, may be made without such answer. (p. 518.)

5. CERTIFICATE OF PUBLICATION—*Amendment.*

Amendment of a certificate of publication of a notice may be made under leave of the court, as in the case of amendment of return of service of process. (p. 518.)

6. DEED—*Description.*

What is a sufficient description of land in a deed. (p. 520.)

Appeal from Circuit Court, Doddridge County.

Separate bills by B. W. Foley, for the benefit of himself and other lien holders, against F. J. Ruley & Bro. and others, and by W. S. Stuart, for the benefit of himself and other lienholders, against said defendants Ruley. The two cases were consolidated, and from a decree for complainants defendants appeal.

Affirmed.

48	513
47	787
43	513
49	11
50	165
43	513
52	358
43	513
54	478
54	494
43	513
59	479

JAS. HUTCHINSON and C. T. CALDWELL. for appellants.

W. S. STEWART, JOHN BASSEL, C. W. LYNCH, and M. H. WILLIS, for appellees.

BRANNON, JUDGE :

B. W. Foley, suing for the benefit of himself and other lien holders, brought a chancery suit against F. J. Ruley & Bro. and others to enforce the lien of a judgment of the plaintiff and judgments of other parties against the land of Ruley & Bro., and afterwards W. S. Stuart, suing for himself and other lien holders, brought against F. J. Ruley & Bro. a chancery suit for, we may say here, a similar purpose. The two cases were consolidated, and a joint decree pronounced therein enforcing lien and selling lands to pay the same, and F. J. Ruley and others appealed.

The first point made against the decree is that the court should have sustained a plea in abatement filed in the Foley suit by W. S. Stuart, but the short answer to this is that Stuart withdrew that plea. It is said that he could not do that to the prejudice of the Ruleys, considering that this was a suit brought for the benefit of all lien holders, but it was the personal plea of Stuart, and if the Ruleys wanted to make the defense on that plea they should have filed one of their own. I know no law by which the plea, especially a plea in abatement, of one defendant can be insisted upon against the will of the one filing it. But that plea is bad as a plea in abatement. It is leveled at the writ and should pray that the writ be quashed, not order whether the defendant should further answer. 1 Chit. Pl. 462; Steph. Pl. 345.

The second point made against the decree is that two pleas in abatement filed by F. J. Ruley in the Stuart suit were ignored by the court. One of those pleas alleged that the summons was issued February 5, 1894, returnable to the first Monday in February, 1894, which was the same day. That has long been a common practice, and was approved in the case of *Spragins v. Railway Co.*, 35 W. Va. 139 (13 S. E. 45). The other plea set up the pendency of the Foley suit before the commencement of the Stuart suit, averring that Stuart was a defendant in the Foley suit. This is not exactly a plea of another suit pending

between the same parties for the same cause. Such a plea has been sometimes called a plea in abatement, at other times a plea in bar. Bart. Ch. Prac. 247. I regard this plea as in bar under the statute, and that it need not be filed at rules. A point is made against it because not filed at the first rules. Then what is its effect? It states two facts,—one, that another suit brought in behalf of all lien holders to enforce judgment liens against the real estate was already pending at the date of its institution. Is this a good bar to the Stewart suit, except under statute, as between living parties? One judgment creditor can bring his own suit on his own judgment to enforce his lien, unless he has been made a formal party in another suit. As against the estate of a dead man, it is also so. It is true that, after an order of account in a suit to administer a dead man's estate, if another creditor, with knowledge of it, bring a suit for the same purpose, he will pay the cost of his suit. *Laidley v. Kline*, 23 W. Va. 565. This seems to have been the established chancery practice to prevent numerous suits against a dead man's estate, all his assets being a fund for the payment of his creditors, and to avoid their exhaustion by numerous suits: but I do not understand that to be the practice in suits to enforce liens against land of a living man. As to the estate of a dead man there was no prohibition against separate suits by separate creditors until the court had made an order of reference for the convention of all the creditors, thus making the suit one for the benefit of all creditors; but our statute has very properly gone beyond this, and fully provided for a chancery suit to administer his real estate for the benefit of his creditors, and has provided that if, after the commencement of that suit, any creditor commence another suit, either in law or in equity, no costs shall be recovered in such last-mentioned suit. Whether in such case a plea setting up the pendency of the former suit would be in bar, calling for the dismissal of the second suit, is not before us. That would rest on the construction of that statute,—chapter 86, Code 1891. In the case of liens against the realty of a living judgment debtor, our statute, in section 7, chapter 139, Code 1891, has gone far beyond the rule of chancery practice before it, if it be as I have stated above. That statute plainly intends one suit, and one

only, to enforce all liens resting upon the land, and to prohibit multiplicity of suits, devouring the land to the injury of both debtor and creditors. I think that, after a suit is brought by one lien holder for the benefit of himself and others, no other can sue, and though the suit be not so brought, yet another cannot sue after an account of liens is ordered for the benefit of all. The statute allows a defense of this kind to a second suit, because it says that the court may enjoin it and compel him who brings it to come in and assert his lien in the first suit, or may make such order in relation to it as the court or judge may deem right to protect the interests of all parties, and I have no doubt that the pendency of the first suit may be set up by plea in bar of the second suit upon it with costs, because that suit is brought in violation of law. This plea also averred that Stuart was a formal party to the Foley suit. That is another reason why he should not prosecute a second suit, for, as I understand the law, when a party is made a defendant to a suit as to a particular right and may receive in it relief, he must abide its result, receive his relief under it, else there would be endless confusion, great harassment to the debtor, and piling up of costs upon him. It is essential that these principles, to avoid multiplicity of suits, burdensome costs, and confusion of proceedings, be rigidly enforced. But in this case this plea was not followed up. The defendants did not bring it to hearing, nor prove the facts involved in it. Where there is a demurrer, and it is not expressly passed on, it is deemed to have been overruled, because no facts are necessary to be shown there, the bill showing them; but a plea introduces new facts, and they must be proven. Say that, as the cases were heard together, the facts stated in the plea would be shown by the record of the Foley case; what then? Looking at it, we find that the Stuart bill is more comprehensive than the Foley bill, embracing matters not embraced by the latter bill; and particularly it attacks a conveyance of a tract of land to the wife of D. C. Ruley as voluntary and fraudulent as to creditors, a matter of importance to creditors not at all contained in the Foley bill. Now we shall have to treat this plea under principles governing the plea treated of in the books as a plea of another suit pending. It is in effect an allegation that another

suit is pending between the same parties, on the theory that the same relief can be administered in one of the chancery suits as in both. Turning to Bart. Ch. Prac. 369, we find that in order that such a plea be available "it is requisite that the whole effect of the second suit should be attainable in the first, and if it appears on the face of the plea that this is not the case the court will overrule it, and it sometimes happens that the second bill embraces the whole subject in dispute more completely than the first. In such cases the practice appears to be to dismiss the first bill with costs, which puts the case upon the second bill in the same situation that it would have been if the first bill had been dismissed before the filing of the second. The common practice in such cases is to hear the causes together. The defense of another suit pending does not apply where the second bill, though by a different person, although for the same matter, as far as concerns the foundation of the demand, is for a different equity." 1 Beach, Mod. Eq. Prac. § 33, says that "the pendency of a prior suit will not be a bar to a subsequent suit, if the latter embraces more as to parties and subject-matter than the former, but it may justify an order of the court staying the further prosecution of the first suit." I cannot say, under these special circumstances, that this second suit was subject to dismissal, seeing the difference in matter here specified and in some other respects, especially as section 7, chapter 139, Code 1891, enables the court to make any order that may seem right and proper in such case, and the court has ordered the suits to be consolidated and heard together, and I do not see that any harm can come to the defendant from that, except a small amount of costs prior to the consolidation. It is true it may be argued that Stuart, as to the tract of land which he sought to subject, conveyed by the alleged fraudulent deed, could have filed an amended bill in the Foley suit, as it was brought for the benefit of all lienors; yet, under the well-established law laid down above, I hesitate to say that Stuart's suit could have been dismissed. And, then, suppose the court ought to have dismissed the Stuart suit on this plea, shall we reverse this decree for that error of mere proceeding, which seems to involve nothing more than a small amount of costs, when we know that in the Foley case the decree

was proper? That would justify the decree, and we ought not to allow this error, if such, in the Stuart suit to destroy the rights of the parties under the Foley suit.

The third point against the decree is that the court overruled the demurrer of the defendants to the Stuart bill. No cause of demurrer is assigned or appears, unless we say, as is argued, it was the pendency of the Foley suit, and this did not appear upon the face of the Stuart bill, and is no ground of demurrer. *See v. Rogers*, 31 W. Va. 475, (7 S. E. 436). The point that the South Penn Oil Company, having several oil leases on the real estate, was not made a party, is another ground of demurrer, but its rights do not appear on the face of the bill, and in fact that company was made a party to the Stuart case and the Foley case.

The fourth point made against the decree is that the court overruled the demurrer on one day, and required the defendants to answer on the next. I should say that this was an unreasonably short time, as a general thing, but the defendants did not ask longer time, did not ask a continuance; and there is nothing in this point, because the decree entered at that term was only an order of reference, not a decree on the merits, decided nothing, and the defendants had until the next term to file their answers, and did then file them.

Now, we come to the exceptions to the report of the commissioner. One exception is that proper notice of the commissioner's execution of the order of reference was not given. The certificate of publication showed its publication for four weeks, but not successive weeks. Would we not take it that the publication was four successive weeks rather than one week was skipped? I do not think that the omission of the word "successive" hurt the certificate. But an affidavit of the publisher, filed by leave of the court, amended the return in that respect, and I take it that it was as proper to allow that amendment as, under the same principles, authorizing the court to allow the amendment of the return of an officer of process, which is done at any time during the proceedings, and sometimes later, with great liberality. The editor is an officer, executing an order of publication, and the same principles apply to his certificate, or return thereof, as to officers' returns.

Another exception is because the tracts of one hundred and twenty-five and twenty-six acres were reported as owned by the partnership of F. J. Ruley & Bro., making them first liable to partnership indebtedness, while the title papers showed that it was owned by F. J. Ruley and his brother. Those papers show that the conveyances were to the firm.

Another exception is that a tract of one hundred and ninety-seven and one-half acres was the property of Lenora V. Ruley, as she could have shown, had she been served with process. She was a party to the Foley bill, and was served with process. That bill did not show why she was a party, but she came in and filed her answer, alleging ownership in the tract, but offered no proof thereof, save her answer, which was denied by replication; and the proof in the case shows that it was purchased with partnership money, and at the time of this report she had not filed her answer. Besides, she signed the Maxwell deed of trust, which distinctly recited that this tract of land belonged to F. J. Ruley. So there can be nothing in this exception to the report.

Another exception is that the commissioner reported a certain debt due under the Hammond deed of trust in blank. In one part of his report the commissioner, in referring to the land owned by Hammond, leaves the amount of the debt blank, but in the formal report of liens he gives the specific amount of that debt.

Another exception is that the report allowed a debt of sixty-five dollars and seventy-five cents in favor of Edwin Maxwell, special commissioner, for the use of Lewis Maxwell. It is said Edwin Maxwell could not assign the debt as commissioner; but the parties were before the court, and the decree would protect the debtor, and those entitled to the debt are making no exception, and, besides, the matter, if error, is below the jurisdiction of this Court, and not assignable as error for reversal.

Another exception is that the report allows a certain judgment in favor of G. D. Camden's estate, because it constituted a purchase-money lien on land in Ritchie. Except for the statement of the answer, denied by general replication, we do not know that any such fact exists, and we need not therefore discuss the question whether the

commissioner erred in reporting this debt, but it seems to me that if so the commissioner was bound to report that debt as a judgment binding the lands involved in this suit, as Camden could look to this land as well as his own, the debt being a personal debt, a judgment lien debt, and a specific lien debt. How could the commissioner omit it from his report? If Camden's debt should exhaust the Doddridge land, it might give right of substitution to some other creditor on the Ritchie land, if in fact any such exists.

Another exception is that the commissioner erroneously reported a deed of trust debt, under a deed of trust from the Ruleys to Edwin Maxwell, trustee, alleging that the description of the lands therein is uncertain. That trust conveys certain tracts of land lying on Arnold's creek and tributaries, and headwaters of Doe run, in Central and West Union districts in Doddridge county, giving description relative to each tract. Two of the tracts so reported were not identified, and were not decreed, but the others were, I think, identified by the aid of extraneous testimony. All that is required for description in a deed is reasonable certainty, and the deed need not be in itself fully capable of identification, because extraneous testimony, to apply the deed to the subject-matter to which it relates, and thus identify it, may be admitted to help out the description of the deed. This is very well established. *Simpkins v. White*, 43 W. Va. 125 (27 S. E. 241); *Thorn v. Phares*, 35 W. Va. 772 (14 S. E. 399); *Warren v. Syme*, 7 W. Va. 474.

Another exception is that the Ruleys should have had a credit of one thousand five hundred and seventy-four dollars seventy cents upon a certain Lewis Maxwell debt secured by a deed of trust. This is based on a certain alleged payment made on the 2d of April, 1890, upon certain indebtedness of the Ruleys to Maxwell. Afterwards, on the 4th of February, 1893, they gave the deed of trust to secure this debt, and they say that they did not get credit for that amount, but had laid the papers away and forgotten them. A settlement between Maxwell and them took place at the date of the execution of the deed of trust. In fact, they admit that there were three settlements, including this settlement at the date of the deed of

trust. Strange that they would forget so large a payment. The fact that the payment was made is unquestionable, but we do not know the elements entering into the settlement at the time of the date of the deed of trust. They did not appear before the commissioner to set up this credit, although the account lingered before him month after month for four months. When parties have settlement, it is conclusive, in the absence of mistake or fraud, and a bond or note—in this instance, a solemn deed of trust—is conclusive upon all items of the included account, and the burden is on the party seeking to re-open it, and he must distinctly allege, and by clear, convincing evidence prove, the particular facts. The court ought not to refer the matter to a commissioner to settle the accounts between the parties prior to the date of the settlement. But, I repeat, they made no effort to sustain this alleged credit before the commissioner, and his report is presumed to be right. *Caldwell v. Caperton*, 27 W. Va. 397; *Smith v. Patton*, 12 W. Va. 541, point 5; *Fry v. Feamster*, 36 W. Va. 454 (15 S. E. 253). No objection is made to any debt reported, save as to the omission of this credit.

Another exception is to the report as to the lien of the deed of trust executed by the Ruleys to indemnify Holmes as security in certain notes, on the ground that Holmes is proceeding to collect his claim for indemnity under another collateral trust on personal property, and the commissioner reports that said deed of trust cannot be enforced, for Holmes has not paid any of the debts for which the deed was executed. Now, this deed of trust constituted no lien on the lands, because it indemnifies as to notes which Holmes had signed, or might thereafter sign, without specifying any notes in any way, and is too general. *Goff v. Price*, 42 W. Va. 384 (26 S. E. 287). This debt was in fact not decreed against the land, but was declared a lien, and it was reserved for the future to decree upon it, and there is no ground for reversal of the decree on that score; but it can never be decreed, because of its voidness.

Another exception is that the commissioner erred in the manner or way of reporting the priority of liens. It is useless to go through the whole report to specify under this exception. It is sufficient to say that the liens are given their proper priorities, some debts being first lien on

certain property and second lien on other property, which is very commonly the case. This exception is too general, anyhow. It does not put its finger upon any error as to priority given to any debt, and an exception to a report like this, reporting various claims upon various parcels of real estate, ought to give specifications. *Crislip v. Cain*, 19 W. Va. 438.

Another exception is that the commissioner reported that the realty would not rent for enough in five years to discharge the liens. The evidence referred to, to sustain this exception, consists of depositions taken in an entirely different case, not in these cases, and not referred to or made part of the record in any order or in any wise, and were taken in a suit in which the Ruleys were not parties. D. C. Ruley, one of the owners of the land, and one of the appellants, when asked about the renting of the land, said in his deposition before the commissioner, when asked if it would rent for sufficient in five years to pay the liens, including the Maxwell deed of trust: "I do not think it would. It would have to rent very high if it did." There is nothing to sustain this exception, but the evidence is against it. Then, there was the Maxwell deed of trust. There was no right to rent the land, when it in law called for a sale. Besides, the liens reported aggregated nearly twenty-five thousand dollars, and there being about one thousand, eight hundred acres of land worth about twenty dollars an acre, how could it keep down the interest and discharge the principal of this large sum in five years? The bills charge that it would not, and they were taken for confessed at the time commissioner made his report.

Another exception says that the commissioner erred in not reporting a certain deed of trust given by the Ruleys to Franklin Maxwell. Strange that debtors would except to the failure to report an additional debt against them. They cannot do it, because it does not aggrieve them. The truth is that this Maxwell debt constituted a part of a second deed of trust, and had the commissioner reported this first debt he would have made the Ruleys pay the same twice, as Maxwell's answer admits it.

The last point made against the decree is that it failed to subdivide the land into lots for sale. The defendants stood by during all this proceeding, and never until after

the commissioner's report, and the cause was ready for hearing, did they ask that it be done. They could not ask that the case be stayed for an order of partition or subdivision. The lands were decreed to be sold, in various tracts as conveyed, of different quantities, from fifteen to two hundred acres, except that there was one tract of three hundred and fifty-six and one-half acres. Besides, if the court had not directed how to sell, it is a matter left to the discretion of the commissioner. *Rose v. Brown*, 17 W. Va. 649. But the court directed it to be sold in tracts as conveyed, which is stated in *Ror. Jud. Sales*, § 81, under the authority of Chancellor Kent, to be the proper course. We see no error in this. We therefore affirm the decree.

Affirmed.

CHARLESTON.

PRICE *et al.* v. CITY OF MOUNDSVILLE *et al.*

Submitted February 6, 1897—Decided April 28, 1897.

1. SUPREME COURT OF APPEALS—*Review on Appeal—Constitutional Law.*

This Court is in duty bound to inquire into the constitutionality of an act of the legislature, when the question is properly presented for its consideration. (p. 525.)

2. LEGISLATURE—*Title of Act—Object of Act.*

If the original title of a bill is sufficient, the legislature does not vitiate the legislation by rendering such title more definite and specific during the progress of enactment, if the object of the bill is not thereby essentially changed. (p. 527.)

3. ACTS OF THE LEGISLATURE—*Journal—Constitutional Law.*

A mere clerical omission in the journal of either house will not vitiate an act of the legislature, if there is sufficient on the face of the journal to show substantial compliance with constitutional requirements. (p. 528.)

Appeal from Circuit Court, Marshall County.

Bill by B. W. Price and A. Tomlinson against the city of Moundsville and others. Decree for defendants, and plaintiffs appeal.

Affirmed.

J. B. McCURE, for appellants.

EWING, MELVIN & EWING, for appellees.

DENT, JUDGE:

B. W. Price and A. Tomlinson, citizens and tax payers of the county of Marshall, appeal from the order of the Circuit Court of said county dissolving an injunction awarded them against the city of Moundsville and its officers. The question involved is the constitutionality of the act of the legislature amendatory to the charter of said city, passed on the 9th day of January, 1895. The objections to the enactment are: First, that the title thereof, as passed by the two branches of the legislature, was so materially variant as to make a different enactment by each house, and render the same invalid; second, that the journal of the house does not affirmatively show the bill to have been read three times; third, that the boundaries of the city, as set forth, are not certain and definite.

At the very threshold of the case comes up this inquiry as to whether this Court is bound by the enrollment of the bill, as an absolute verity, and therefore precluded from making inquiry as to whether constitutional requirements have been fulfilled in its enactment. The common law, or English rule, which has been followed by the Supreme Court of the United States, as to congressional enactments, and many state courts, is that the enrollment, ratification, and approval of an act of the lawmaking branch of the government render the same conclusive and unimpeachable, and forever preclude the judiciary from inquiring into the procedure in relation thereto prior to its enactment. In England there is no written constitution controlling the legislative branch of the government, and the acts of parliament, being regarded in their nature as judicial,—as emanating from the highest tribunal in the land, are placed on the same footing and regarded with the same veneration as the judgment of the courts, which cannot be collaterally attacked. With regard to the enactments of congress, there is no provision in the Constitution of the United States authorizing the courts to inquire into their constitutionality, either as to the procedure in enactment, or as to whether the subject-matter of the act conforms to

the constitution. By usurpation, in the first place, as is sometimes claimed, the Supreme Court of the United States invested itself with authority to determine whether an act of congress contravened the express provisions of the Constitution; but when it came to the question as to whether the court should further usurp the right to go behind the solemn authentication of an act, and determine whether, in the enacting procedure, constitutional requirements had been adhered to, the court stopped short, and held that the respect due to co-equal and independent divisions of the government requires the judicial department to rely on the solemn assurance of the legislative and executive departments that in the passage of the act the required constitutional procedure had been fully complied with in all respects. *Field v. Clark*, 143 U. S. 649, (12 Sup. Ct. 495). The Constitution of this State is not a grant to, but an express limitation of the powers of, the legislature; and while it divides the government into three co-ordinate departments (the legislative, executive and judicial), and provides that they shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others (Const. Art. V, sec. 1), it imposes on the judiciary the duty of deciding the constitutionality of a law, without limitation; thus not only authorizing inquiry as to whether the act itself is within constitutional limitations, but also as to whether the same has been enacted in conformity with the express mandates of the Constitution. There is no such comity between the separate departments of the state government as would require submission to the alleged acts of each other in violation or defiance of the express requirements of the Constitution. No unconstitutional enactment in this State can interfere with the rights of private citizens unless it is sanctioned by all three of the departments of the State government. The Constitution, as the expression of the will of the people, is the supreme law, and it is the duty of each department of the State government created by it to see that it is preserved inviolate. Their comity is first due to it, and then to each other. If one or more of the departments of the government can wholly disregard and nullify the wholesome provisions of the Constitution, and then impregably fortify themselves behind their own

solemn authentication, this "solemn authentication" becomes a substitute for the Constitution, and the mere will of the legislative or executive department, or both, becomes the will of the people, and the Constitution is as though it never had been. Being brought into disrespect in one feature, the whole thereof is liable to the same disregard and irreverence. It is not a case of jealousy between the separate departments, but each one, in all its acts, should be ever ready to challenge the most careful scrutiny and investigation into its strict allegiance and loyalty to the spirit and letter of the instrument which gives it existence and clothes it with power. A different rule prevails in other states, dependent upon the provisions of the various constitutions as construed by their courts of last resort. See *Carr v. Coke*, 116 N. C. 226, (22 S. E. 16), when the question is fully discussed, with an elaborate note, in 47 Am. St. Rep. 801, 814. To the converse, see *Spangler v. Jacoby*, 14 Ill. 297; also 58 Am. Dec. 571, and elaborate note. The rule established in these latter authorities is that "a bill duly enrolled, authenticated, and approved is presumed to have been passed by the legislature in conformity with the requirements of the Constitution, unless the contrary is made to affirmatively appear; and the proof furnished by the journals of the two houses in matters of procedure must be clear and conclusive, to overcome this presumption." The journals must affirmatively show the omission by the legislature of some essential constitutional requirement, to overcome the presumption of validity. Heretofore this Court has followed this rule. *Osborn v. Staley*, 5 W. Va. 85.

1. In reference to the question of title: On examination of the journals of both houses, it appears that the act in controversy was introduced into the house under the title of "House Bill No. 15. A bill to amend and re-enact chapter 4 of the Acts of 1889." And under this number and title it was carried through the house. When sent to the Senate, the title was changed so as to read: "An act to amend and re-enact sections 2, 3, 5, 8, 9, 11, 13, 17, 20, 27, 29, 31, 32, 35, and 42 of chapter 4 of the Acts of the Legislature of West Virginia, passed on the 13th day of February, 1889, to amend the charter of the city of Moundsville, and to extend its corporate limits,"—under which

latter title it was carried through the senate, signed by its president and the speaker of the house, approved by the governor and duly enrolled. Section 30, Art VI., of the Constitution, provides that "no act shall embrace more than one object, and that shall be expressed in the title,"—thus requiring every act to have a title expressive of the object of the bill. Section 41 provides that each house shall keep a journal of its proceedings, and cause the same to be published from time to time, and all bills and joint resolutions shall be described therein as well by their title as by their number. The only essential requirements as to the title is that it shall express the object of the bill, and there is no provision of the Constitution which inhibits the legislature, during the progress of legislation, from changing the language of the title of a bill so as to render it more definite and specific without altering the object thereof. In this case the original title comprehended everything that was included in the amended title. Had it not done so, there would have been some reasonable grounds of complaint. The change was unnecessary, yet it afforded those interested a larger information of the proposed changes in the law. Hence, it was in no sense misleading, and therefore could not invalidate the enactment. If the original title is sufficient, the legislature does not vitiate the legislation by rendering such title more specific during the progress of enactment, if the object of the bill is not thereby essentially changed.

2. In relation to the failure to read the bill a second time: When it came up in the house in regular order for its second reading, a motion was made to dispense therewith, which was lost. Several amendments were offered, and one adopted, and it was then passed on its third reading. The journal does not say that the bill was read a second time, but it is plainly apparent from what it does contain that this is a mere clerical omission, which, in a court of record, would be amendable on motion. The legislature having expired, its journal is beyond the power of amendment, as there is no one legally authorized to make such amendment. The courts therefore will supply all clerical mistakes in such records, to prevent the failure of a solemn legislative enactment by mere clerical misprision. The legislature having fully complied with the Constitu-

tion, its acts will not be vitiated by a defect in the journal which is shown on the face thereof to be clerical in its nature; for in such case it does not affirmatively appear that the legislature did not conform to the requirements of the Constitution, but the reverse is apparent, though not expressed in so many words. If a journal does not furnish the means of amendment, on its face, as to any essential matter that may be omitted, then the act would be vitiated. Such is not this case, for the second reading is apparent from the journal, though not expressed in words. *State v. Francis*, 26 Kan. 732.

3. In relation to the boundaries: The last complaint is that the act does not make the boundaries certain and definite. In what respect plaintiffs are injured by this fact is not made plain in the bill, and, if not injured, they have no right of complaint. The boundary, however, seems to be precise and certain. Natural objects, such as the Ohio river, Grove creek, the penitentiary sewer, and various others, any one of which would give a surveyor a permanent starting point to locate all the lines mentioned, even if the corners were not marked and located on the ground, which is presumably the case. The injunction in this case was awarded for the purpose of giving the plaintiffs an opportunity to be heard in this Court on the novel questions presented by them. When the application was first made to the circuit judge for an injunction, instead of passing on the matter as presented by the plaintiff's bill, he permitted the defendants to also present their answer, and then proceeded to adjudicate the matter as though it were a motion to dissolve, rather than an original application, and refused to award the injunction, thereby depriving the plaintiffs of the right to appeal and have their case heard and determined in this Court; and so the injunction was granted by one of the judges of this Court, as a matter of necessity, to secure plaintiffs the right of appeal. Therefore the circuit court committed no error in immediately dissolving the same, as the object thereof was secured. The error, if any was committed, was by the judge, in allowing the defendants to appear and present answers and make defense before an injunction had been awarded. There is no provision in the law for any such procedure. It is true that a court or judge may require

reasonable notice to be given of the plaintiff's application but he is only to be satisfied with the plaintiff's equity by affidavit or otherwise before he acts thereon; and it is not expected that he shall have the issues made up on a pure bill for injunction on application, and thereby deprive the applicant of all power of appeal from a decision on the merits. In other words, on the original application he must view the case from the standpoint of plaintiff's papers, and, if from these he is satisfied of the equity, he grants the injunction, and requires a sufficient bond to cover the defendant's damages, provided the injunction should afterwards appear to have been illegally awarded. When a circuit court or judge finally hears and determines a case on its merits, he should enter an appealable order, and not one that requires a party to begin anew by application for original process to a judge of this Court. In this case, however, a motion to dissolve would have raised all the questions involved, as they must be tried by the act itself and the journal of the two houses, and the court would judicially take notice of both, as essentially dependent, and an answer was unnecessary. Order dissolving injunction affirmed.

Affirmed.

CHARLESTON.

WALLIS v. NEALE *et al.*

Submitted February 12, 1897—Decided April 28, 1897.

43	529
47	494
43	529
48	495

1. GUARDIAN AND WARD—*Purchase for Ward—Liability of Guardian.*

Where a guardian, in pursuance of the request in writing of his ward, purchases for her a horse, and executes his notes as guardian for the purchase money, and she accepts and uses the horse for several years, and finally trades it for a horse and colt, which she afterwards sells, and receives the proceeds, although the guardian, by executing such note, becomes personally liable for the purchase money, this fact does not relieve the estate of the ward from liability for said purchase money. (p. 537.)

2. GUARDIAN AND WARD—Resignation of Guardian—Settlement.

If a third party pay said purchase money for said ward, and takes up said notes, and, said guardian having resigned, said third party is appointed guardian for the ward in the room and stead of said former guardian, he will be entitled to credit in the settlement of his accounts for the amounts so paid for his ward, the benefit of which was received by such ward. (p. 537.)

Appeal from Circuit Court, Mason County.

Bill by Sallie A. Wallis against E. L. Neale and W. R. Gunn. Decree for defendants, and plaintiff appeals.

Affirmed.

TOMLINSON & WILEY, for appellant.

J. B. MENAGER and W. R. GUNN, for appellees.

ENGLISH, PRESIDENT :

On the first Monday in March, 1895, Sallie A. Wallis filed her bill in the Circuit Court of Mason county against E. L. Neale, her guardian, and William R. Gunn, seeking thereby to surcharge and falsify the account of said Neale as her guardian. The bill alleges: That one J. D. Withers was appointed, qualified, and gave bond as her guardian, and served as such until July 7, 1892, when he resigned, and the defendant E. L. Neale was appointed such guardian in the room and stead of said Withers. That on July 7, 1892, said Neale qualified as her guardian, and gave bond as such, with the defendant William R. Gunn as his surety thereon. That on November 15, 1893, she intermarried with ——— Wallis, her maiden name being Sallie A. Colwell. That on January 8, 1894, said E. L. Neale, as her guardian, made a settlement of his accounts as such guardian before John E. Beller, one of the commissioners of accounts of Mason County, wherein he charged against the plaintiff's estate one note and interest paid F. J. Jones, one hundred and twenty-three dollars, which she alleges was an improper charge against her or her estate. That neither she nor her estate ever owed such a note or interest thereon, and therefore said item was improperly allowed by said commissioner, and that said credit should be deducted from said settlement. And the plaintiff designates

the following items as improper credits to said E. L. Neale as her guardian, to wit: sixty-five cents as of March 5, 1892; six dollars as of May 25, 1892; fourteen dollars and forty-three cents as of December 29, 1892; thirteen dollars and eighty-eight cents, date not given; duebill to F. J. Jones for ten dollars. That the amount found due said guardian, marked "Amount due guardian and to balance, \$196.96," is illegal and improper. That said guardian had no authority to involve her estate in debt to exceed the income therefrom in any one year, and that the said sum of one hundred and ninety-six dollars and ninety-six cents was improperly charged against her estate, and should be stricken from said settlement made by said commissioner on January 8, 1894. That said settlement was confirmed by the county court on April 3, 1894, and ordered to be recorded, and a certified copy thereof is exhibited. That on December 7, 1894, said E. L. Neale, as guardian for plaintiff, made a second settlement of his accounts as such guardian before John E. Beller, a commissioner of the county court of Mason county, wherein said guardian was allowed the following credit: "By amount due guardian at last settlement, \$196.96; interest on same, \$10.36,"—which sums plaintiff alleges were illegal and improper credits allowed said guardian, and that neither of said items is properly allowed as a credit to said guardian in said settlement, and that said items should be stricken out. That the item in said settlement, "Amount to balance and due guardian, \$29.30," is improper, and should not have been allowed or charged in said settlement, and should be stricken therefrom. That the said settlement of December 7, 1894, made by her said guardian, E. L. Neale, containing the charges and credits above complained of, was confirmed by the county court of Mason County on January 8, 1895, and ordered to be recorded, a certified copy of which settlement and the order of confirmation was exhibited. That the defendant W. R. Gunn was and is the surety of E. L. Neale on his bond as plaintiff's guardian, a certified copy of which bond was exhibited.

The plaintiff further alleges that she was twenty-one years of age on the — day of November, 1894, and is therefore entitled to the possession and control of her estate, both

real and personal, and that there is justly due her from her said guardian the sum of two hundred and seven dollars and thirty cents. She therefore prays that the credits and charges above set forth may be stricken from the said settlements, and each of them, and that the said E. L. Neale be required to pay to plaintiff any sum found due her; that the order confirming said settlements be set aside and annulled as to the items therein set forth, and that said settlements of account be surcharged and falsified as to the items above set forth; that the court decree to her the sum due her from her said guardian, against said guardian and W. R. Gunn, the surety on said guardian's bond, and that the case be referred to a commissioner to make a true and final settlement of the guardianship accounts of said E. L. Neale; and for general relief. On the 9th day of May, 1895, the defendant E. L. Neale demurred to the plaintiff's bill, which demurrer was overruled by the court, and thereupon said Neale tendered his separate answer to the plaintiff's bill, which was ordered to be filed, and the plaintiff replied generally thereto, said defendant by his answer putting in issue all the material allegations of the plaintiff's bill, and the cause was referred to H. R. Howard, one of the commissioners of the court, to settle the account of said E. L. Neale as guardian of the plaintiff, Sallie A. Wallis (*nee* Colwell), and to take, state, and report an account of all the money and property that had come into the hands of said guardian by virtue of his appointment as such. Several depositions were taken before said commissioner, and on the first day of August, 1895, said Commissioner Howard returned his report, in which he found that said guardian had overpaid his ward the sum of eight dollars and ninety-five cents. The plaintiff, Sallie A. Wallis, excepted to said report—*First*, because the commissioner allowed the note of one hundred dollars given by a former guardian of plaintiff for a horse, together with interest thereon, as a charge against plaintiff's estate, and said defendant E. L. Neale was allowed a credit therefor; *secondly*, because said commissioner allowed said guardian credit for a duebill given by plaintiff's former guardian, together with interest thereon; *third*, because said commissioner allowed said guardian for an account of Neale Bros., and for looking after the real estate of his said

ward; *fourth*, because said commissioner allowed said guardian a greater price for hauling than he charged in his settlement, surcharged and falsified in this case,—and asked that all the evidence taken in the case and all vouchers filed before said commissioner be certified to the circuit court of Mason County. On the 11th day of February, 1896, the cause was finally heard, and the court overruled said exception, and sustained said report, except as to the balance due said E. L. Neale from Sallie A. Wallis, which balance amounted to the sum of eight dollars and ninety-five cents as shown by said report, which was thereby disallowed, and to that extent said report was corrected, and it was further decreed that the plaintiff take nothing by her bill, and that each party should pay their own costs; and from this decree Sallie A. Wallis applied for and obtained this appeal, and assigned the following errors, to wit: “(1) The court erred in sustaining the report of the commissioner, H. R. Howard. (2) The court erred in overruling plaintiff’s exceptions to said commissioner’s report. (3) The court erred in entering the decree of February 11, 1896.”

These assignments may be considered together. It appears, from the testimony in the case, that J. D. Withers was appointed guardian for the appellant in December, 1886; that she owned a tract of land containing one hundred and fifty acres, about thirty of which were under cultivation; that said Withers lived near this tract of land, and looked after its management and cultivation for his ward, but made no settlement of his account as such guardian; that on the 7th day of July, 1892, said J. D. Withers resigned his guardianship of said ward, and the defendant E. L. Neale was appointed her guardian in the room and stead of said Withers; and that said Neale received nothing belonging to the estate of said ward from said Withers, but proceeded at once to control and cultivate said tract of land. On the 11th day of March, 1890, J. D. Withers, who was then guardian of the appellant, in pursuance of her written request, purchased for his said ward from F. J. Jones a horse, for the consideration of one hundred and ten dollars, executing his note as of that date, for one hundred dollars, with interest from date, which note was signed, “J. D. Withers, Guardian for Sallie A. Colwell,”

and on the same day executed a duebill for ten dollars to said F. J. Jones, signed in the same way. Both said note and duebill were executed for the horse purchased by said guardian, and said Withers in his deposition states that he never paid either of them. It appears, however, from the testimony in the cause, that said note for one hundred dollars and duebill for ten dollars were assigned by F. J. Jones to Neale Bros., and were paid by the defendant E. L. Neale before his appointment as guardian for the appellant. It further appears, from the testimony, that the horse purchased as aforesaid by Withers went into the possession of the said ward, and was used by her for several years, and was finally traded off by her for a horse and colt, which she sold for fifty dollars. As we have seen, these two items of one hundred dollars and ten dollars, the purchase money for said horse, which were allowed said E. L. Neale, guardian for the appellant, as a credit in the settlement of his account, together with the accrued interest thereon, form the basis of the two first exceptions to Commissioner Howard's report. Now, while it is true that transactions between guardian and ward and other persons connected by peculiarly confidential relations are looked upon with jealousy, and if improper advantage is taken of the influence belonging to the relation the transaction will be invalidated, yet in this instance it appears that the horse in question was purchased for the ward in pursuance of her request in writing, and that, in making the purchase, Withers, the guardian, had a due regard for his ward's condition in life, and could not be considered as having exceeded his duty as a careful guardian of his ward's interest in supplying her with such necessities as her condition in life demanded. It is true the note and duebill executed by him as guardian did not bind his ward's estate in law, but it is shown by the testimony that she received and enjoyed the use of the horse that was purchased at her request by her guardian, and that subsequently, after arriving at the age of twenty-one years, she traded it for another horse and colt, which she sold, and received the proceeds. Can we regard this conduct on her part in any other light than that of having ratified the action of her guardian in making such purchase?

Schouler, in his work on Domestic Relations, in section 435, thus states the law on this point: "It seems settled that silence for an unreasonable time, taken in connection with other facts, such as using the property purchased, retaining possession of it, selling or mortgaging it, or in any way converting it to the infant purchaser's own use, would be sufficient ratification to bind the infant after reaching manhood, as where a minor bought a yoke of oxen, for which he gave his note, and after arriving at full age converted the oxen to his own use and received the avails. Mere lapse of time, it is true, will not usually amount to confirmation, unless the complete bar of limitations is fulfilled. But a brief lapse of time, in connection with other circumstances, making the infant's position inequitable if he means later to disaffirm, may amount to confirmation." Woerner, in his recent work on the American Law of Guardianship (section 57, p. 187), says: "It is an old and familiar doctrine that infants and other persons under disability to contract are bound nevertheless for necessities to the extent of their reasonable value to those who furnish them by reason of the need or at the request of the infant; but if furnished at the instance or request of another, such as a parent, friend or guardian, the infant is not bound, unless both the father and guardian refuse to support the child. For necessities so furnished by a guardian he will be reimbursed out of the ward's estate. * * * So, where the contract of the guardian was entered into at the request of the ward, and ratified by him after majority, the guardian will be allowed, in his settlement with the ward, credit for payments under such contract, but without ratification by the ward the loss will fall on the guardian." So, also, in the case of *Reading v. Wilson*, 38 N. J. Eq. 449, the court in its opinion says: "For any reasonable expenditure made by a guardian out of his own means for the benefit of his ward, he is, of course, entitled to be reimbursed out of the ward's estate; but this is the limit of the ward's liability, whether measured by rules of law or equity." Under the head of "Guardian and Ward," 9 Am. & Eng. Enc. Law, 150, the law is stated: "Where the act of the guardian is not fraudulent, but is unauthorized, the ward at his majority may elect either to ratify or reject it, unless the court has

previously confirmed it. If he repudiates the transaction, he must first resign whatever benefit he has received through it. And ratification will be presumed if, after becoming of age, he receives and retains the benefit with knowledge of the facts, or acquiesces in the action for a long time, or by other acts shows his approval." And in the note on page 151 it is said: "The ward will be presumed to have ratified the guardian's purchase of a horse and buggy for him out of the principal of his estate if, after majority, he continued to use them, and received the proceeds of their sale,"—citing *Caffey v. McMichael*, 64 N. C. 507.

Now, as between J. D. Withers and the appellant, if he had paid F. J. Jones the notes he executed for this horse, there can be no question that in the circumstances shown by the testimony said Withers would be entitled to be reimbursed out of the estate of his ward. It appears, however, that F. J. Jones assigned this bond and duebill to Neale Bros., and the defendant E. L. Neale paid them before he was appointed guardian for appellant, and was entitled to step into the shoes of Withers with reference thereto. This bond and duebill represented a debt, for which, although Withers was personally liable, yet the estate of his ward was also liable, and the defendant, E. L. Neale, by paying the purchase money for said horse, became the owner of that debt against the estate of said ward, and she became liable to reimburse him the amount he had paid F. J. Jones for her. In the case of *Barnum v. Frost's Adm'r* 17 Grat. 398 (third point of syllabus), it was held that "bonds executed by the guardian as guardian, showing on their face that they are given for the ward's expenses, and which, at the time, he promises to pay out of the profits of the ward's estate as soon as he can collect them, will relieve the ward's estate from liability for these expenses." In that case the guardian gave his bonds for the payment of his ward's expenses while living with a relative in the city of Norfolk for her education and support, undertaking to pay as soon as he could collect the funds of the estate. Rives, J., in delivering the opinion of the court, says, speaking of the lady with whom the ward lived, and to whom the debt was coming: "Perhaps she might have enforced a personal liability on

these bonds against the guardian at law, where his addition would be treated as a mere *descriptio personæ*, especially if the bonds stood alone, without opposing proofs; but it is otherwise in equity, which regards the substance rather than the form, and explores the acts of the parties to give effect to their intentions." And, after citing several authorities, he further says: "In view of these authorities, I cannot see how it can be successfully contended that the giving of these notes by the guardian, under the circumstances, can be held to distinguish the appellee's claim upon the infant's estate, if such claim is properly cognizable in equity." In the case we are considering the defendant, E. L. Neale, paid the purchase money to F. J. Jones for this horse, which Withers, her guardian, had agreed to do, but failed. The notes he took up from Jones were merely paper evidences of the debt which her guardian, Withers, had contracted to pay at her request, and the defendant, E. L. Neale, by paying these notes, paid the purchase money for the horse, which she received and continued to use after she arrived at the age of twenty-one years, and which she traded off, and received the proceeds of the sale of the horse and colt for which she traded it. Her estate got the benefit of the horse, and the defendant Neale, having paid for the same for her, is entitled to be reimbursed out of her estate. So it was held in the case of *Kitchen v. Lee*, 11 Paige 107, that "infants are not permitted to retain the benefits of purchases or contracts which they repudiate."

It is claimed by the appellant that she ought not to pay for the horse because the debt is evidenced by notes, and that E. L. Neale, as guardian should not be allowed credit for the amount paid on the purchase money of the horse, and for necessities for her, because he paid for them out of the income of succeeding years. In the case, however, of *Barton v. Bowen*, 27 Grat. 849 (third point of syllabus), it was held that, "in paying the ward's expenses for board and tuition, the guardian expended the principal of her personal estate. As a court of equity would have authorized the expenditure, if application had been made to the court for authority to do it before it was done, a court of equity will approve and confirm it after it is done." Under our statute (Code, c. 82, s. 8), the principal or a

portion thereof, meaning the personal estate of the ward, may be applied towards the ward's education or maintenance when allowed by the circuit court on petition; and the facts disclosed in this case would have supported such a petition on behalf of the appellant.

The next exception to the commissioner's report is claimed because said commissioner allowed said guardian for an account of Neale Bros. This firm was engaged in selling merchandise at a store in the neighborhood of the appellant, and the defendant E. L. Neale was one of the firm. The account referred to consists of articles furnished his said ward from this store which account was paid by said E. L. Neale, and an itemized account is filed, which shows on its face that the articles sold appellant from said store were necessities, and the proof shows that they were suitable to her condition in life.

The next exception is claimed because the commissioner had allowed the guardian a sum for looking after the real estate of his ward. The commissioner in the case under consideration allowed the guardian ten *per cent.* for his trouble in looking after and managing her estate. This sum the commissioner thought reasonable, and the court below has approved his finding. Prof. Minor, in his Institutes (volume 1, p. 490), says: "A commission of 7½ and even 10 *per cent.* has been allowed under peculiar circumstances, where the estate was troublesome to manage, and the amount of money received small" (which comports with the facts in this case), citing *Fitzgerald v. Jones*, 1 Munf. 156; *McCall v. Peachy's Adm'r*, 3 Munf. 306; *Cavendish v. Fleming, Id.*, 202.

The remaining exception to the commissioner's report is claimed to consist in the fact that the commissioner has allowed said guardian a greater price for hauling than he charged in his settlement, surcharged and falsified in this case. It is true that the guardian, in making his *ex parte* settlement, was liberal with his ward, and charged her less for hauling than the proof shows it was really worth; but the appellant was not satisfied with that settlement, and, having filed her bill to surcharge and falsify it, the account had to be stated *de novo*, and in so doing the commissioner must rely upon the evidence, and we see nothing in the evidence sufficient to disturb his findings. The rule in re-

gard to recommittal of commissioners' reports, where they have been confirmed, has been laid down by this Court in the case of *McGuire v. Wright*, 18 W. Va. 507 (point 4 of syllabus), where it is held that, "where questions of fact are submitted to a commissioner in chancery, his finding upon such facts should be sustained, unless the court is satisfied from the evidence before the commissioner that such findings are erroneous, though such report is not entitled to as much weight as the verdict of a jury." See, also, *Reger v. O'Neal*, 33 W. Va. 159 (10 S. E. 375).

My conclusion, therefore, is that the circuit court committed no error in over-ruling the exceptions to the commissioner's report and in dismissing the plaintiff's bill. The decree is affirmed, with costs and damages.

Affirmed.

CHARLESTON.

CLAY *et ux.* v. CITY OF ST. ALBANS.

Submitted January 18, 1897—Decided April 30, 1897.

1. PLEADING—*Title—Possession.*

Pleadings must show title. This rule is met, in declarations in trespass or case for injury to property, real or personal, by alleging a possession as indicated below, without stating the plaintiff's estate. (p. 540.)

2. SEISIN—*Freehold Estate.*

The word "seisin" imports a freehold estate, either for life or in fee. (p. 541.)

3. POSSESSION—*Trespass—Case—True Owner.*

Actual possession of land will sustain trespass or case against any but the true owner entitled to possession, or one acting under him. (p. 542.)

4. HUSBAND AND WIFE—*Wife's Separate Estate—Maintenance of Actions.*

A wife, or she and her husband, may maintain trespass for damages to both possession and the inheritance, where there is a conveyance of the land to a trustee to permit her to have possession and use of land, though she is vested with only equitable title. (p. 542.)

43	539
146	443
43	539
47	817
47	818
43	539
57	136
43	539
58	255
68	286
43	539
166	538
166	662

5. HUSBAND AND WIFE—*Wife's Separate Estate—Maintenance of Action.*

A married woman may sue alone, or she and her husband together, at law or in equity, in any action or suit concerning her separate estate. (p. 543.)

6. MUNICIPAL CORPORATIONS—*Surface Water—Damages.*

If a city or town, by gutters, drains, or otherwise, collect surface water and cast it in a body on land, it is liable in damages. (p. 544.)

7. MUNICIPAL CORPORATIONS—*Surface Water—Act of God.*

If a city or town negligently fails to keep its existing drains and gutters open and clear of obstructions, and in condition to carry off the water in them, and by reason thereof land is injured from their overflow, the city or town is liable in damages, provided the overflow is not due to an unusual or extraordinary storm or rainfall. (p. 546.)

Error to Circuit Court, Kanawha County.

Action by M. C. Clay and wife against the city of St. Albans. From a judgment for plaintiffs, defendant brings error.

Reversed.

WARTH & BRIGGS and BROWN, JACKSON & KNIGHT, for plaintiff in error.

S. C. BURDETT and E. W. WILSON, for defendant in error.

BRANNON, JUDGE:

This was an action of trespass on the case by M. C. Clay and Amanda Clay, his wife, against the city of St. Albans, to recover damages for injury caused by the flow of surface water upon a lot occupied by them, resulting in judgment against the city, which sued out this writ of error.

The declaration is attacked on demurrer because it fails to plead the title of the plaintiffs,—not showing whether they claim in fee, or for life or years, in present or future estate. It is plain that a declaration must have legal certainty in all material elements. It must tell wherein and how the plaintiff has been injured; if in property, it must tell what property right has been invaded. This is but the common, basic rule of the law of pleading applicable to declarations and other pleadings, "that the pleadings must show title,"—not title in the common-speech meaning (that is, deeds or

other muniments of title), but their results; the right flowing from them; the right, estate, or property interest wherein the party has been harmed. "When, in pleading, any right or authority is set up in respect of property, personal or real, some title to that property must, of course, be alleged in the party, or in some other person from whom he derives his authority. So, if a party be charged with any liability in respect to property, his title to that property must be alleged." Steph. Pl. 286; 4 Minor, Inst. 1182. But how is the title to be pleaded? This is a practical question, often of perplexity. Counsel claim that this declaration should say whether the estate is in fee, for life, for years, in remainder or reversion, as the case may be; but I do not think so, for it is well settled that, where there is an injury to a present estate in real or personal property, an allegation of possession by the plaintiff is a sufficient pleading of title; and it will do to allege that personal property was "the goods and chattels of the plaintiff," or that he was "lawfully possessed of certain goods and chattels, that is to say" (specifying them); and in case of realty it will answer to say that the land was "the close of the plaintiff," or that "he was lawfully possessed of a certain close" or "a certain tract of land" (specifying it). Steph. Pl. 286; *McDodrill v. Lumber Co.*, 40 W. Va. 564, (21 S. E. 878). Standard forms show this. Under such statement of title any kind of right or estate in possession, fee simple, for life, or for years, may be shown, but not a future estate, in other words, that mode of statement imports an immediate estate or property. This must be so, because one in possession has some kind of immediate estate in present enjoyment, and possession is an element of title, and *prima facie* evidence of good title to some kind of estate, and possession alone will support trespass. If the estate injured is a remainder or reversion, though vested, yet not vested in actual possession, you must allege such estate in proper manner. In some cases it is necessary to set out the derivation of title and the estate, as in certain pleas; but generally not in declarations, and not in those for injury to property. Now, test this declaration by these principles. It avers that Amanda Clay was "seised, and, together with the plaintiff M. C. Clay, her husband, has been during all that time, and

still is; possessed, of a lot of land." Here is an averment of possession, and, though it does not say of what estate they were seised and possessed, yet it imports some immediate, present estate, not a future one, and is good, under the doctrine above given. Possession alone is sufficient to maintain trespass or case against a wrong-doer. Steph. Pl. 287; *Wilson v. Manufacturing Co.*, 40 W. Va. 413, (21 S. E. 1035).

As to the point that the declaration does not aver that the town collected surface water and cast it on the lot: It does sufficiently do so. It is clear that the town has a right to get rid of surface water, but it must not collect it in bodies, and cast it on property, changing its former flow. This declaration says that "by means of negligence and improper construction of ditches, *etc.*, great bodies of surface water, changed in course, were turned and cast upon" the lot.

Counsel next say that there is a variance between declaration and proof. The declaration goes for permanent damages to the freehold, and alleges a freehold estate in the wife, whereas the evidence shows a deed to a trustee to hold upon trust to permit Mrs. Clay to hold, use, and occupy the lot for her own separate use, free from claims or debts of her husband, and to convey it as she might by will or writing direct, and, on failure to do so direct, then to convey to her heirs. The trustee holds the legal title; the wife, the full use and benefit. The deed antedates the Code of 1868, which contained our first separate estate act; but under principles of courts of equity without the help of that statute, it is her separate estate under such a deed. *West v. West*, 3 Rand. 373; *Lewis v. Adams*, 6 Leigh, 320; Code 1868, c. 66, s. 1. At first blush it would seem to be a variance, but is it so for the purposes of this suit? This depends on the question whether the plaintiffs can maintain this action; for, if so, there is no available variance. They could surely recover for disturbance of possession, mere possession being sufficient to support trespass. And, even in states where the husband and wife cannot join in an action for injury to her separate estate, they may, on their common possession, recover for injury to that possession, though not for injury to the very property itself,—the *corpus* or inheritance. *Railway Co. v.*

McLaughlin, 77 Ill. 275; *Railroad Co. v. Grabill*, 46 Ill. 445; *Noyes v. Hemphill*, 58 N. H. 537; *Lyon v. Railway Co.*, 42 Wis. 548. But can they recover damages to the body of the estate? It is contended they cannot join in an action for injury to her separate estate. As he has no interest in her separate property, and the action must generally be in the name of the person holding title, one would think it would be misjoinder for both to sue. Many eminent authorities so hold, but many hold that they can unite in suits on contracts with her, or concerning in any wise her separate estate. In this State they may sue together, or she may sue alone. *McKenzie v. Railroad Co.*, 27 W. Va. 306; *Fox v. Insurance Co.*, 31 W. Va. 374 (6 S. E. 929). But there is the legal title in the trustee, not in her. She has only an equitable title, and, under general principles, it is a stranger to a court of law, that court knowing only the legal title. Realty conveyed to a wife under our statute gives her legal title, but this case is a deed of trust prior to that act, and the wife has an estate only in equity. Chapter 66 of the Code provides that a trustee holding land in trust for a married woman may convey it to her on order of a court; showing that that legislation, in such a case as this, looks upon the trustee as holding legal title notwithstanding that chapter. 1 Perry Trusts, § 328, says: "As the legal title is in him [the trustee], he alone can sue and be sued in a court of law, and the *cestui que* trust, the absolute owner of the estate in equity, is regarded in law as a stranger. * * * A trustee may also maintain an action for any trespass upon the land; but, if the *cestui que* trust is in the actual possession, he may maintain an action for an injury to the possession." "Suit must be in the name of the party vested with legal title, though the equitable interest be in another. Suth. Dam. § 130. Many authorities to same effect. Hill, Trustees, 274, 316: *Bakersfield v. Baker*, 40 Am. Dec. 668; *McRaeny v. Johnson*, 2 Fla. 520; note to *Doggett v. Hart*, 58 Am. Dec. 472; *Poage v. Bell*, 8 Leigh, 604; *Taylor v. King*, 6 Munf. 358; Dicey, Parties, 333, 340. But in *McKenzie v. Railroad Co.*, 27 W. Va. 306, trespass by a married woman was sustained upon an equitable title,—a deed to her from her husband, void at law, vesting her with an estate in equity only. JUDGE SNYDER said—what is exactly true in this

case, upon the deed involved—that the wife was the absolute owner in fee of the entire beneficial estate; the husband, a mere trustee holding legal title without beneficial interest; that, if she had the legal estate, she would be entitled to recover; that she would be entitled to the damages recovered; that the wife being, by reason of possession, entitled to maintain the action, and, by reason of her equitable ownership, entitled to the damages, and as no other action could be brought by the husband, but he would be barred by this, she could recover. This would make the judgement in favor of the wife beneficiary *res judicata* against the trustee in a court of law. Certainly it would in equity, as it would not allow a second action. Hence we hold that these plaintiffs may maintain this action, and there is no variance, upon the face of said former decision. If this be open to technical objection, it attains justice on this point, though it seems to go further than the general rule.

I think there is no tenable objection to the evidence of McComas giving his opinion as to damage. *Jordan v. City of Benwood*, 42 W. Va. 312 (26 S. E. 266).

Plaintiffs' instructions: The omission of the words "for public use" in No. 1, instructing that property can neither be taken nor damaged without just compensation, is very plainly immaterial. There was no hint or shadow of a taking or damaging for private use before the jury. How could a sensible jury possibly be misled by it? It would apply to the case before the court. Besides, property cannot be taken either for private or public use without compensation. Instruction 2 tells the jury that "if the injury was caused by the natural flow of the water being changed and cast upon plaintiff's property by the cuttings, or extending drains or ditches, or by filling in the street, or by any or all such causes combined, the defendant is liable." This instruction is ambiguous. For what is a mere change of the flow of surface water incident to the proper work of improvement, even though it do injury to a land owner, if it still spreads out as surface water naturally does, a municipal corporation is not liable in damages; but it cannot collect it in a body, and as such cast it upon land, so as to furrow it out and create or enlarge drain courses through it. You cannot make such

corporation liable unless your case comes up to that test or standard as shown in *Jordan v. City of Benwood*, 42 W. Va. 312 (26 S. E. 266); *Yeager v. Town of Fairmont*, 43 W. Va. 259 (27 S. E. 234). Any other principle would tie the hands of a city. Now, this instruction says that "if the injury be caused by the natural flow being changed and cast upon the property." How cast,—in a body, or spreadingly? It does not say. In the one case the city would be liable; in the other, not liable. Does it mean that the flow of water in drains or ditches, and therefore already in a body, was diverted, and thus thrown on the land? The city had a right to fill a street, and, if that fill had any effect to divert surface water so it was still scattered, no liability therefrom arose. Just what theory this instruction presents is uncertain. Does it present a different one from that of No. 3 below? Does it set up a less standard of liability? If so, it is wrong. Does it present the same? Not likely, because it is in different language. And, if the same, then it is unnecessary. It must have been intended to present a different theory. Just what, is indefinite. An indefinite instruction must not be given. How was the jury to reconcile it with No. 3? No. 3: "When a city, in grading its streets, by cutting ditches and drains collects surface water, and casts it in a body upon the lot or ground of the proprietor below, unless it so casts it into a natural water course, the proprietor sustains a legal injury, and may recover therefor." This is, on its face, proper. But No. 2 ignores the requirement that the water be cast in a body, and states a less exacting standard of liability, indicating that mere surface water, in a spreading, scattered condition, will make the town liable. No. 4: "The court instructs the jury that it is the duty of a city, in making improvements upon its streets, to use such skill that improvements so made shall not change the course of the surface water in such manner as to materially injure the property adjoining." This may be good as to negligent doing of work, though the work, if not negligent, do incidentally injure a lot by change of the course of what is surface water, yet if it still spread over the surface, or percolate through the soil, and it is not by the change made to run in destructive currents, plowing drains or courses through the soil and washing it away,

the city or private landowner is not liable. This instruction disregards that distinction, and asserts that if there be a change, and it do injury, that is enough to fix liability. That is not enough to fix liability. If the work of the corporation does change the former state of things as to surface water so that thereafter it flows in a body or destructive current over the land, the city is liable; otherwise not. No. 5 is good: "The court instructs the jury that, in disposing of surface water, a municipal corporation has no right, by any means whatever, to collect and cast the same upon the property of an individual."

As to the evidence, as the case may be retried it is improper for us to pass on its effect; but, in view of certain evidence bearing on the condition of the drains, I will advert to the law seeming to be pertinent. Our Code gives municipal corporations power to construct drains and gutters. They may or may not, as they choose, exercise this power in any street, as the right to elect to do so or not to do so is a matter of discretion, *quasi* judicial; but when once the corporation decides to do so, and constructs sewers or drains and gutters, the duty has become merely ministerial, and the town bound to keep them in fairly good condition to carry off the water ordinarily and naturally coming into the gutter or sewer in the section where the town is, so as not to overflow lot owners. The town is not bound for great and unusual floods. If there comes a cloudburst or great rainfall, out of the ordinary experience, and it is too great for the capacity of the drain or gutter, or if it bring down rock, drift, sand, or other debris, choking up the drain, and overflowing, the town is not liable. It is the unexpected,—out of the ordinary course of nature. But if the city allows those obstructions to remain,—if it allows its drains or gutters to clog up,—and damage ensue, it is liable. That is no more than the application of the rule above stated, that the corporation must not in any manner collect or gather surface water in a body, by ditches or drains or gutters, and cast it on a lot owner. If it makes a drain or gutter, it necessarily collects water before then spreading, and it must carry it off. That is only negligence. Elliott, Roads & S. 363; Jones, Neg. Mun. Corp. § 144; 1 Beach, Pub. Corp. §§ 764, 767; *Hitchins v. Mayor, etc.*, 68 Md. 100; *Gilluly v.*

City of Madison, 63 Wis. 518, (24 N. W. 137); *Weis v. City*, 75 Ind. 241; 2 Dill. Mun. Corp. § 1051, cl. 4; *Nims v. Mayor, etc.*, 59 N. Y. 500; *Richmond v. Long*, 17 Grat. 375, point 3. Our conclusion is to reverse the judgment and grant a new trial.

Reversed.

CHARLESTON.

TENNANT v. TENNANT *et al.*

Submitted February 1, 1897—Decided April 30, 1897.

EXPRESS TRUST—Will—Evidence—Sufficiency of Evidence.

Testator, at the instance of his sons M. and A., made a will devising M.'s share to A. "because my son A. has advanced to my said son M. the value of all the interest in my estate which my son M. could have but for the will, which is made in fact to enable my son M. to obtain said advance from his brother, A." In a suit by M. against A. to establish a trust in the former's favor, plaintiff testified that his interest was devised to defendant on the latter's promise to make him equal with the other children, and that said promise was not kept; while defendant swore that he purchased his brother's share outright, and paid him one thousand dollars therefor. There was evidence that before the will was made defendant advanced money to plaintiff to enable him to remove to another state, and paid some of his debts; that plaintiff returned to the State eighteen months prior to his father's death, and settled on a part of the land, and when his father died allowed his share to be partitioned to his brother, frequently declaring that it belonged to him, and for nine years after probate of the will remained on the land under sufferance of defendant, bringing suit only when the latter demanded possession. There was evidence of declarations made by defendant after testator's decease that he held the land for plaintiff, and that he afterwards agreed to convey it to him for one thousand five hundred dollars. *Held*, that a decree refusing to declare a trust should not be reversed. *By a divided court.*

Appeal from Circuit Court, Monongalia County.

Bill by Milton Tennant against Asa Tennant and others

to declare a trust. From a decree dismissing the bill, plaintiff appeals.

Affirmed by a divided court.

R. L. BERKSHIRE and GEO. C. STURGISS, for appellant.

CHAS. POWELL and U. N. ARNETT, JR., for appellees.

DENT, JUDGE :

Milton Tennant appeals from a decree of the Circuit Court of Monongalia County rendered in a chancery suit wherein he was plaintiff and Asa Tennant, his brother, was defendant, and assigns as error the dismissal of his bill without granting the relief prayed. The following is a statement of the case: On the 1st day of March, 1880, at the instance of his two sons, Milton and Asa, Jacob Tennant made his will, which is as follows: "I, Jacob Tennant, of Monongalia County, West Virginia, being of sound and disposing mind and memory, do make, publish, and declare this my last will and testament in manner following; that is to say: That after my death, and the payment of all my just debts and funeral expenses, my estate, real and personal, of every kind, wherever and however situate, shall be divided into such number of equal parts as shall be equal to all my children who or whose descendant or descendants shall be living at the time of my death, always including in such enumeration my sons, Asa and Milton, whether they, or either of them, or any descendant of either, be living at the time of my death or not: and that two of such equal aliquot parts be given to my son Asa, or, in case he shall have died, to his heirs at law. Second: That one of such equal or aliquot parts of my estate be given to each of my other children (or to their descendants in case any of them shall have died before me leaving descendants), always excepting and excluding my son Milton and his descendants; the true intent and meaning of this, my will, being that my son Asa shall represent both himself and my son Milton in the distribution of my estate, both real and personal; and that subject to this provision and intention my estate shall pass to my children and their descendants just as the same would pass at law; and the reason of this is not that I discriminate against my son Milton, nor favor my son Asa, but because my said son

Asa has advanced to my said son Milton the value of all the interest in my estate which my son Milton could have but for this will, which is made in fact to enable my said son Milton to obtain said advance from his brother, Asa, and with the understanding had in my family that this will is necessary and proper to secure an equal division amongst my children, and that the same shall never be revoked. Witness my signature and seal this first day of

March, 1880. Jacob X^{his} Tennant. [Seal.] Witnesses: Henry
mark

P. Wilson. [Seal.] Ira Bailey. [Seal.]" Milton Tennant insists that he was about to move permanently to Texas, and it was agreed between himself and Asa that the latter was to have his share in his father's estate, and pay him therefor its value in money; that he did go to Texas, and, after staying about three years, returned, and settled down on his father's land, he still being in life; that his father died in July, 1884, and the will was probated, and shortly afterward the land was divided, and two shares were allotted to Asa in accordance with the provisions of the will, but that plaintiff was permitted to take possession of one of the shares, containing about ninety-one acres, as his own, and held the same until the institution of this suit, repaying Asa with grain, *etc.*, any taxes paid by him; that Asa had never paid him his share in the estate, or any part thereof, but had conceived the intention of holding the appellant's share by virtue of the will without recompensing him therefor in accordance with the agreement made with his father to make appellant equal with the other children, and had brought suit to dispossess him. Asa, on the other hand, claims that the appellant agreed to take one thousand dollars for his share, without regard to the question of equality, and that he had fully paid the same, or secured it to be paid at the time; that when the land was partitioned he rented one share thereof to the appellant, who accounted to him for the rent, and that he has always paid the taxes thereon; that at the instance of appellant he offered to let him have the land for one thousand five hundred dollars, which sum he claimed it would take to make him whole, and appellant agreed thereto, but, failing to make such payment, he brought suit for possession. Appellant says the agreement was that the price he was

to pay to retain the land was one thousand five hundred dollars, less the price of eleven and one-fourth acres, sold to Peter Youst, and damages received for a county road and rental for oil lease and pipe-line were to be deducted, which Asa denies. What the contract or agreement was between the parties at the time the will was executed is not all satisfactorily established, there being no memorandum or statement thereof in writing, other than what the will contains. Asa alleges that he was to pay one thousand dollars to appellant, but he entirely fails to establish such to have been the contract. There is no evidence but his own in relation thereto, which is contradicted by the appellant, who is supported by the language of the will. The evidence, as it appears in the record, decidedly preponderates against the full payment by him of the one thousand dollars, and yet appellant admits as a matter of compromise he agreed to repay him one thousand five hundred dollars, less certain deductions heretofore mentioned. The terms of the will is the only written evidence as to the contract between the parties, and they are in these words: "And the reason of this is not that I discriminate against my son Milton, nor in favor of my son Asa, but because my said son Asa has advanced to my said son Milton the value of all the interest in my estate which my son Milton could have but for this will, which is made in fact to enable my son Milton to obtain said advance from his brother, Asa, and with the understanding had in my family that this will is necessary and proper to secure an equal division amongst my children, and that the same shall never be revoked." The consideration for the will is the value of all the interest of the appellant in the estate of the testator, no part of which is pretended to have been paid at the time of the execution of the will, and it therefore furnishes no evidence of payment.

It is a well-established principle of equity jurisprudence that where a person obtains a devise or bequest in his own name on promise to hold it for the benefit of another, the nominal devisee will be held to be a trustee, and the bequest a trust for the benefit of such other. As is said in the case of *Church v. Ruland*, 64 Pa. St. 442: "This doctrine fastens upon the conscience of the party having thus

procured a will, and then fraudulently refusing or neglecting to fulfill the promise on the faith of which it was executed, a trust or confidence which a court of equity will enforce by compelling a conveyance when the proper time for it has arrived." Also: "The trust insisted on here, however, owes its validity not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee to get at him." The fraud consists in the breach of duty and obligation on the part of the nominal devisee. Story, Eq. Jur. § 781: "In the case of *Oldham v. Litchford*, 2 Vern. 506, it being proved that the devisee of certain real estate had promised the testator that he would pay an annuity, which otherwise the testator would have charged on the real estate devised, it was decreed that the annuity should be charged on the land." In this case the appellee obtained a devise of property which would otherwise have been devised to the appellant on the promise of payment to the appellant of the value of the interest devised. His after-refusal to do so justifies a court of equity in charging upon the property devised in favor of the appellant the value thereof, or in holding the appellee as a trustee for his benefit, giving him the choice to pay the value or surrender the property. *Williams v. Vreeland*, 29 N. J. Eq. 417; also 32 N. J. Eq. 135, note. Nor does the fact that the will may have been made in such manner to secure the value of the appellant's interest to himself and prevent his creditors from seizing the same render the same fraudulent, as the testator had the right, without being guilty of fraud, to secure the appellant's inheritable interest in such way as to prevent it being taken by his creditors. In *Jones v. McKee*, 3 Pa. St. 496, (6 Pa. St. 425),—a case in which a son, being financially embarrassed, persuaded his mother to give all her lands by codicil to her will to his sister, who would hold one-half of such devise in trust for him, to which the sister being present assented,—held, that the sister was a trustee for her brother as to one-half the lands, and that subsequent parol admissions of the sister were admissible to establish the trust. So, in this case, the admissions of the appellee, and his willingness to deed the land to the appel-

lant on being made whole, is competent testimony to establish the provision of the will as creating a trust in him for the benefit of his brother. Nor is the parol agreement entered into by them in violation of the statute of frauds, for it amounts on the part of the appellees to nothing more than an agreement to execute his trust, which he was equitably bound to do. Where one agrees verbally to do that which he is already under legal obligation to perform, such agreement is not rendered invalid by the statute of frauds. The parties thereto seem to have misunderstood each other as to the terms of the agreement, and therefore, their minds never having met, it was not a binding contract, but operates as a mere evidential admission of the trust.

From the language of the will it is plain that the testator was induced by the devisee to make it on assurance that he would satisfy the appellant in such way as to secure him an equal share with the other heirs. He now claims he purchased the interest outright for one thousand dollars, and, if he could have proven such to have been the arrangement agreed to by the testator and accepted by the appellant, and that such consideration was fully paid, he would be entitled to prevail. But, as heretofore shown, this he utterly failed to do. Having failed to show a full compliance on his part with the conditions on which he received the devise, the court should have held him *pro tanto* a trustee as to such devise, and holding the same for the benefit of the appellant; that is, until the appellant was made equal in all respects with the other heirs or devisees, as the plain object of the testator was to secure such equality. For this reason I am of the opinion the decree complained of should be reversed, and this cause remanded to the circuit court, with direction to ascertain, by reference to a commissioner or otherwise, what sum will be required to make the appellant equal in all respects with the other devisees of Jacob Tennant, deceased, and charge the same on the land in controversy, or, in case the said appellee so elects, ascertain the amount necessary to make him whole as to such sums paid by him under his agreement with his father, and require him to execute a deed to the appellant for said land on repayment of the said amount necessary to make him whole. In which McWHOR-

TER, JUDGE, concurs; but ENGLISH, PRESIDENT, and BRANNON, JUDGE, being of the opinion the decree should be affirmed, it so stands.

BRANNON, JUDGE:

I cannot consent to reverse the circuit court in this case. The first question presented is, what kind of a trust exists in favor of the plaintiff, if any? As Asa Tennant is not shown to have been guilty of fraud in the procuring of the devise in his favor,—I mean that act itself,—it occurred to me that on the basis of fraud there could be no trust. I know it is laid down that one who procures property by fraud is a trustee for the injured party. *Coleman v. Cocke*, 6 Rand. (Va.) 618. I thought that on the basis of mere fraud a trust could not be erected, unless the devise itself was procured by fraud, and that the mere breaking of a promise to make the party equal with money would not erect such a fraud, but be ground of action at law. I find much authority to sustain this position. In *Hoge v. Hoge*, 1 Watts, 163, Gibson, C. J., reviewed this question, and it was held that a devise would be a trust when followed by evidence that it was obtained by the fraud of the devisee, and he said that a mere refusal to perform the trust is undoubtedly not enough, and it was necessary that there should be in the party an agency, active or passive, in procuring the devise; and he cited *Whittan v. Russell*, 1 Atk. 448, in which it was thought by high authority that even a promise to the testator to perform the trust was not such an agency, because the fraud, if any, there consisted not in the procurement of the will, but in the subsequent neglect to perform the trust, and that every breach of promise is not a fraud. And 2 Minor, Inst. 226, seems to deem it essential that there must be fraud in obtaining the conveyance to make the party a trustee. 2 Pom. Eq. Jur. § 1054, says: “Whenever a person procures a devise or bequest to be made directly to himself (and thereby preventing, perhaps, an intended testamentary gift to another) through false and fraudulent representations, assurances, or promises that he will carry out the original and true purpose of the testator, and will apply the devise or bequest to the benefit of the third person who is the real object, and who would otherwise have been the actual re-

cipient, of the testator's bounty, and after the testator's death he refuses to comply with his former assurances or promises, but claims to hold the property in his own right, and for his own exclusive benefit,—in such case equity will enforce the obligation by impressing a trust upon the property in favor of the one who has been defrauded of the testator's intended gift, and by treating the actual devisee or legatee as a trustee holding the mere legal title, and by compelling him to carry the trust into effect through a conveyance to the one who is beneficially interested. It is not necessary that the representations, assurances, or promises of the actual devisee or legatee should be in writing; they may be entirely verbal. There are a few cases which seem to hold that a trust will arise under these circumstances from a mere verbal promise of the devisee or legatee to hold the property for the benefit of another person. This position, however, is clearly opposed to settled principle. The only ground upon which such a trust can be rested, and is rested by the overwhelming weight of authority, is actual intentional fraud." It will be found laid down upon authority in *Towles v. Burton*, 24 Am. Dec. 409, and the appended note thereto, discussing this subject, that where one is induced to refrain from making or altering his will so as to give a bequest or make other provision for a person for whom he wishes to provide, by the promise of the heir or devisee or legatee under the will, to make such provision himself, and the promise is not performed, equity will charge the promisor as a trustee on parol proof of the promise, in favor of the person for whose benefit it was made. In *Langtry v. Langtry*, 2 Am. Rep. 310, the Illinois court held that, if one voluntarily conveys land to another, the latter having taken no measure to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C., the case falls within the statute of frauds requiring a trust to be expressed in writing, and a court of equity will not enforce the promise. But it was said that if the grantor was intending to convey the land directly to C., and B. interposed, and advised A. not to convey it to C., but to convey it to him, promising, if A. would do so, he would hold the land in trust, chancery would lend its aid to enforce the trust upon the ground that B. obtained the title by fraud-

ulent imposition upon A. The distinction, said the court, may seem nice, but it is well established. In the one case B. had no agency in procuring the conveyance; in the other he has had an active and fraudulent agency. In the one case he has done nothing to prevent a conveyance to the intended beneficiary; in the other he has, by false promises, diverted to himself a conveyance about to be made to another.

Pomeroy, in note to section 1054, states that the majority of the recent decisions do not insist on actual fraudulent intention on the part of the devisee or legatee as necessary to the creation of a trust of this kind. In *Bedillian v. Seaton*, 3 Wall. Jr. 279, (Fed. Cas. No. 1,218,) it was held that not only will no trust arise from a mere verbal promise to the testator, however solemn, but none will arise from a fraudulent promise; only a contract which equity will enforce. So it seems that there is a great conflict on the question whether there must be actual intention of fraud in the procurement of a devise to create a trust. Now, where the statute of frauds requires a declaration of trust to be in writing, I would think that it would require actual fraud in the procurement of the act to erect a trust. A promise to do certain things would clearly create a ground of action at law for its breach, but, where the statute requires a trust to be declared in writing, a mere oral promise would not do so. You would have to take it out of the statute of frauds on the ground of fraud in the very procurement of the deed or devise. But when I come to think, as our statute of frauds does not require a writing to create or prove a trust in real or personal estate, the trust here alleged to exist is simply and only an express or direct trust, not a constructive trust. If Asa Tennant did promise to accept that devise, and hold the land in trust for Milton, or to give him such part as would make him equal in land, or to make him equal in money, it would doubtless be an express trust, for an express trust means a trust created by words, either expressly or impliedly evincing an intention to create a trust. 27 Am. & Eng. Enc. Law, 3; Hill, Trustees, 55; 1 Perry, Trusts, § 73. There is no earthly need, to sustain the trust here alleged, to place it on the ground of a trust *ex maleficio*,—that is, on the ground of fraud in the procurement of the devise,

—for, if Asa promised to take that land for the purposes stated, he is under an express trust beyond all question, though without writing. *Currence v. Ward*, 43 W. Va. 367 (27 S. E. 329); *Nease v. Capehart*, 8 W. Va. 95.

But is there a trust? Here it is settled that to establish an express trust the evidence must be clear and decisive. Loose and indefinite expressions will not do. *Hill, Trustees*, 59; *Phelps v. Seely*, 22 Grat. 573. To fix upon a man who has been given title to land absolute on the face of deed or will a trust, and thus take away from him his property, or right conferred, you must fix the trust upon him by unquestionable and full proof; and, if you place the trust upon the ground of fraud, the law is, as stated in *Underh. Trusts*, 187: "That being a jurisdiction founded on personal fraud, it is incumbent on a court to see that a fraud or *malus animus* [evil mind] is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof." I do not think an express trust is clearly proven. Asa Tennant says that before his father made his will, by agreement between him and Milton, Milton, who wanted to move to Texas with his family, sold him his interest, he soliciting the transaction, at one thousand dollars, which he paid him. Milton says he did not sell him his interest, but that his interest was to be devised to Asa under the promise that he was to make him equal with the other children, either in land or money, as he might choose. Which is the true version? I think it clear that the will does not create a trust, or furnish evidence of it, for it declares as the reason for giving Asa two shares that Asa had advanced to Milton "the value of all the interest in my estate which my son Milton could have but for this will, which is made in fact to enable my son Milton to obtain said advance from his brother, Asa, and with the understanding had in my family that this will is necessary and proper to secure an even division among my children, and that the same shall never be revoked." Why does he say it "shall never be revoked"? Because this arrangement had taken place between the two brothers. The father did not intend that Asa should be afterwards deprived of what he gave Milton. Asa swears that he expressed to his father and to Milton a solicitude when they proposed to him to buy and advance

the money on Milton's interest, that he told them he did not want to lose by it, and was reluctant to accept the proposition; but his brother had been unfortunate in business, and was almost penniless, and he did accept it. This clause seems to confirm this statement of Asa's solicitude; for it inhibits any effort to change that will. It declares, instead of a trust, that Asa had advanced to Milton his full share. Now, some declarations made by Asa after his father's death are adduced to sustain this trust; a few declarations that he held the land for Milton. I know of no other evidence to prove this trust, unless you cite Asa's agreement afterwards to convey this land to Milton at one thousand five hundred dollars, cited against him for the purpose of proving the existence of a trust, when the fact that the agreement fixed one thousand five hundred dollars negatived the idea of a trust, and besides it was nothing but a proposition made in an attempted compromise going on just before this suit between the two brothers. Asa, for peace, offered to sell his brother this land for one thousand five hundred dollars. It was no recognition of an existing trust. But *per contra* take the declarations and the actions of Milton himself. They show that he was not to have the land itself at any rate. Frequently Milton said that it was Asa's land. When the lands of his father were partitioned, he was a party, and carried chain in the work of partition, and said to the commissioners he had no interest in the estate. When a road was being opened through the land, he swore before the county court that it was Asa's land. He knew of a deed by which Asa sold eleven and one-fourth acres of it, and was present when he received the money for it, and made no objection; and on another occasion he said that if he had offered to buy the land of Asa for a little home, Asa would not have given him the chance to pay for it that he gave Youst. When Coss wanted to buy the timber on the land, Milton referred him to Asa, saying it was Asa's land, though he was in possession at the time, and urged Coss to buy the timber, and he would haul it, and take some furniture in pay. He knew that Asa rented to Eddy part of the land for buckwheat, and that he received the rent. He was asked by Coss who owned the land, and answered that Asa did, and, when asked what rent he

paid, answered that he helped Asa to put up the grass and wheat, and kept up the fence on the farm, but answered no further as to rent. Why did he not repudiate then all idea of renting? Asa used the land year after year for pasturing and otherwise, save the small part occupied by Milton. Wilson, a witness to the will, asked why Asa got two shares, and the father said that Milton was going to move to Texas, and Asa had bought his interest in the estate; and Milton, being present, said, "Yes; that is just the way of it." Bailey, another witness to the will, verifies Wilson's statement as to what the father said, but says he cannot say whether Milton "was just present in the room at the time or not." Jacob Tennant declared to Morris that Milton was embarrassed with debt, and was going to Texas, that Asa had bought his interest, and paid him for it. This is, perhaps, incompetent evidence. Kent's evidence shows that in 1892 Asa and Milton were negotiating a sale of the land to Milton for one thousand five hundred dollars, and Milton agreed to pay that. Why so, if he was the owner of the land? Milton told Ice and Conway that he had no interest in his father's estate. In the partition the land was assigned to Asa. Asa paid the taxes on it year after year. It seems he leased it for oil purposes. Now, it seems to me these indisputable circumstances repel the idea of a trust to hold the land itself for the use of Milton. They show that he had no interest in the land. Asa says that when his brother was going to Texas with his family, he purchased him his railroad tickets, assumed certain debts for him, and paid him the balance three hundred and seventy dollars in cash. Is this true? This will of the father states that Asa had advanced the money. Milton was insolvent, and was going to Texas, and did go. What more likely than that he would sell out to his more prosperous brother his interest? That Asa did go to Fairmont, and buy the railroad tickets, is unquestionable. But Milton says he paid seventy-five dollars on them himself, and his father furnished the residue of the money. Very unreasonable that the father would furnish money for this purpose when he knew that Asa, as he says in his will, had purchased the interest. We know certainly that Asa assumed three hundred and forty-four dollars debt for Milton, and took up Milton's note. Mil-

ton says that his father borrowed this money of one Billingsly. It seems unreasonable that he would do so. Asa swears, and other evidence corroborates him, that he borrowed the money of Billingsly, and repaid it to him. Strange that the father would borrow the money to pay Milton's debt, if it was true, as the will states, that Asa had advanced the full value of Milton's interest. We know, too, that Asa paid another creditor one hundred and fifty dollars. True, Milton says, and a witness corroborates him, that he handed this money to Asa just before he started to Texas. That might be out of money that Asa had paid him. It is utterly denied by Asa under oath. Where did Milton get the money to carry himself and his family to Texas? He was insolvent. Is it not likely that Asa furnished it, as he swears he did? I wish to know why Asa paid this money, if his story is not true. When we know he purchased these tickets, and paid the one hundred and fifty dollars cash to a creditor, would we not rather attribute it to such a purchase, as Asa asserts, than that Milton, insolvent as he was, furnished the money? This strongly corroborates what the father, said in his will,—that Asa had advanced Milton the full value of his share.

Milton came back from Texas, and settled on his father's land, eighteen months before his father's death. He was still insolvent; more needy, perhaps, than before he went. There he lived close to his father and close to Asa. He did not claim the land, but, instead of that, after his father's death, saw it given to his brother, and made all the declarations admitting Asa's property in the land I have before referred to. Strange that he would, in his poverty, admit such to be the fact if it were not so. If he owed any debts, they were barred by the statute of limitations, and that would not induce him to deny his ownership. And if Asa had not settled with him for his interest, would he not have gone to his father during these eighteen months, and complained of his brother's delinquency, and would the father have rested easy on his bed, day or night, while Asa was perpetrating this injustice? No, he would have burned his will, and made another, giving Milton his share. Never would the old father have allowed this injustice so long, especially as he was ageing, and very soon to depart. He

would have been prompt and eager to do the right. It was upward of four years from the date of that will, certifying that Asa had advanced Milton his full share, until the father's death; and, if Asa had not paid Milton for his interest for so long a period, would we not have heard of it? Milton swears that he did complain to his father. Is this so? That would make us all the more certain if he did that the father would have righted this wrong. Knowing of it, he would not have tolerated it. Again, the will was proven August 9, 1884, Milton present, and moving for its probate, though it gave all his share to Asa. This bill was filed in May, 1893. For nine years after the father's death he remained on that land under the mere mercy and sufferance of his brother, and never until 1893, when his brother demanded possession of the land, did he bring this suit. Strange that he would delay so long in taking some step to make safe his right. Strange, poor as he was, that he would rest easy so many years, and Milton using the great bulk of the land in question. How could he afford to do so? Is it probable that he would have done so? Milton denies that he sold Asa his interest. The father's will declares so, and the father's declaration, made at the time of the execution of his will, and in the presence of Milton, sustains Asa. The mother of the two boys was examined. She exhibits great reluctance to testify between these two clashing sons. She says that the children, in lieu of letting her have land while she lived, each agreed to pay her ten dollars a year. When asked how it came that Asa paid her twenty dollars, she said that would have been his share the way the children made the bargain. Why should Asa pay his mother ten dollars for Milton's share, if Milton owned the land? Milton never paid her any rental. There is evidence tending, I think, very inadequately to sustain the plaintiff's case; but the facts and circumstances above—not merely oral evidence of witnesses, but facts and circumstances beyond dispute—side with the decree entered in Asa's favor in this case. The evidence of the two brothers is in square conflict, and that evidence is most material. The circuit judge has found in favor of Asa's version, supported as he is by so many circumstances of natural probability. The burden of proof is on the plaintiff. Do they not cast doubt upon the ex-

istence of an express trust? The circuit judge has found against it. Can we say the evidence to establish the trust is so plain as to call for his reversal? And as to any fraud in the procurement of the devise itself, there is no evidence. And can we say that amid this conflicting evidence and these circumstances strong against Milton, there is any money yet owing to him from Asa, and that Asa's version of having purchased his interest out and out, and paid him for it, is not true? The circuit judge has found that it is true and that question rested on inferences from circumstances, conflicting oral evidence, and the credibility of witnesses in direct conflict. I think the case was decided right; but I feel at least clear in saying that it is not so manifestly wrong as to warrant a reversal. Different men might differ in the case, but that is no reason for reversal. *Richardson v. Ralphsnyder*, 40 W. Va. 15 (20 S. E. 854).

And, further, as to delay. Where one has to call on equity to enforce a mere executory right, as to declare a trust, not to enforce an acknowledged trust, it is an invariable rule that he must come promptly. *Clarke v. Hart*, 6 H. L. Cas. 655. And if you put relief on the ground of fraud in getting the decree, it is clearer yet that nine years' laches, with full knowledge of right, would bar.

Whittaker v. Improvement Co., 34 W. Va. 230 (12 S. E. 507); *Harwood v. Railroad Co.*, 17 Wall. 78.

Affirmed.

June Term, 1897.

WHEELING.

WILLIAMSON *et al.* v. JONES *et al.*

Submitted February 9, 1897—Decided June 11, 1897.

1. WASTE—Oil—Trespass—Injunction.

Petroleum oil in place is part of the land. Its wrongful extraction by one lawfully in possession is waste, and by a stranger is trespass; in both cases irreparable injury, which may be enjoined. (p. 565.)

2. WASTE—Remainder-Man—Tenant for Life.

It is waste in a tenant for life to take petroleum oil from the land, for which he is liable to the reversioner or remainder-man in fee. (p. 565.)

3. TENANT FOR LIFE—Oil Wells—Salt Wells—Mines.

A tenant for life may work open salt or oil wells or mines even to exhaustion, without account, but cannot open new ones. (p. 566.)

4. WASTE—Tenant in Common—Liability of Co-Tenants.

It is waste in a tenant in common to take petroleum oil from the land, for which he is liable to his co-tenants to the extent of their right in the land. (p. 567.)

5. TENANT FOR LIFE—Personalty—Ownership.

Things part of the land, wrongfully severed by a tenant for life, become personalty, but belong to the owner of the next vested estate of inheritance in reversion or the remainder, not the life tenant. (p. 569.)

6. EQUITY JURISDICTION — Waste — Reversioner — Tenant for Life.

Where there is a life tenant, and timber or other thing part of the realty going to loss, and imperative need calls for it, equity may cause it to be cut or otherwise secured for the remainder-man or reversioner. Equity has power to do so, if it do no harm to the life tenant, or he be compensated. (p. 570.)

7. ESTOPPEL IN PAIS.

Principles of estoppel *in pais* discussed. (p. 571.)

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8. **ESTOPPEL—Title.**

If one claiming sole right to another's land spends money in improving or operating upon it, though ignorant of that other's right, the mere silence of that other will not estop him from asserting his title. He need not seek the other to tell him of his right, or speak at all, unless placed in such a situation as calls upon him to declare his right. (p. 574.)

9. **JUDICIAL SALE—Purchaser—Notice.**

A purchaser at a judicial sale is conclusively held as having notice of all facts touching the rights of others in the property sold, disclosed by the record of the case. (p. 574.)

10. **SUITS TO SELL REALTY—Parties.**

Owners of vested estates in reversion and remainder, whether by legal or equitable title, are indispensable parties to a chancery suit to sell the fee; and the presence as parties of a tenant for life, or of the trustee holding for them, does not make them parties by representation, and a sale under the decree will not affect or pass their right in the land. (p. 576.)

11. **MARRIED WOMAN—Estoppel in pais—Personal Estate.**

A married woman can not, by even fraudulent conduct, be barred under the principle of estoppel *in pais* from asserting her title to land, though separate estate; but as to her personal estate it is different. Now that she is enabled to contract as if single, she will be bound by estoppel *in pais* touching her contracts as if single. (p. 577.)

12. **INFANTS—Estoppel in pais—Fraud.**

An infant of years of discretion, by intentional fraudulent conduct, will be barred, under the doctrine of estoppel *in pais*, from asserting her title to either real or personal property against one misled thereby. (p. 579.)

13. **WASTE—Oil—Accounting.**

A tenant for life, or a tenant in common in sole possession claiming exclusive ownership, taking petroleum oil, and converting it to his exclusive use, is liable to account on the basis of rents and profits, not for annual rental. (p. 580.)

14. **EQUITY JURISDICTION—Injunction—Waste—Damages.**

A remainder-man or reversioner has jurisdiction in equity against a tenant for life to enjoin waste, and to have compensation for the damages, the same as if he sued at law, to avoid multiplicity of suits. The same is the case between tenants in common where one is guilty of waste. (p. 579.)

15. **WASTE—Payment of Proceeds—Interest.**

A tenant for life, who, by waste, has severed from the realty things that are part of it, as petroleum oil, has no right to have their proceeds invested so he may have interest therein

during the life estate, but their proceeds go at once to the owner of the next vested estate of inheritance. (p. 585.)

16. **IMPROVEMENTS—*Allowance for Improvements.***

One making permanent improvements on land as if his own, at a time when there was reason to believe his title good, is to be allowed their value, so far as they enhance the value of the land; but if, when making them, he has notice, actual or constructive, of the superior right of another, he cannot be allowed them. (p. 588.)

17. **TITLE—*Allowance for Improvements.***

One having notice of facts rendering his title inferior to another's, who, by mistake of law, regards his title good, can not claim for permanent improvements. (p. 590.)

18. **OIL—*Waste—Set-Off—Rents and Profits.***

Under the circumstances, a party taking petroleum oil unlawfully is allowed all costs of production, including costs of boring productive wells, as a set-off against rents and profits. (p. 588.)

Appeal from Circuit Court, Tyler County.

Bill by Eliza Williamson and others against J. T. Jones and others. Decree for complainants, and defendant Jones appeals.

Reversed.

CALDWELL & CALDWELL, for appellant.

W. P. HUBBARD, THOS. L. STEATEY, H. P. CAMDEN, and GEO. E. BOYD, for appellees.

BRANNON, JUDGE:

I refer to the report of a former decision in this case for a full statement of the facts. 39 W. Va. 231 (19 S. E. 436). Under the judicial sale, Jones thought and claimed that he purchased the entirety of the two tracts,—one of one hundred and sixty-five acres, and the other forty-five poles; but, as seven undivided tenths vested by the will of David Hickman in Engle, as trustee, to hold for the use of his daughter Eliza Williamson for her life, with remainder to her sisters, and as the remainder-men were not parties to the suit, the decree of sale, and sale under it, were void and ineffectual to pass anything but the life estate in those seven-tenths; and so the remainder in them did not pass under the sale, but remained in the sisters of Eliza Williamson. Jones, however, took exclusive possession, claim-

ing the whole. He bored twenty-three wells in the pursuit and production of petroleum oil. The plaintiffs sued him in equity to enjoin his further production of oil, and for an account of what he had produced. After the decision upon a former appeal an account was taken, and the circuit court held that Jones pay the owners of the seven-tenths of the land for one-eighth of seven-tenths of the oil produced, and seven-tenths of the value of the timber taken from the land, thus charging Jones only for one-eighth of the oil, that being the usual rent, commonly called "royalty," in that section stipulated and paid to the land owner under oil leases. Jones appeals, and he assigns error in charging him with anything at all, and for other causes; and the plaintiffs cross assign error in charging Jones only with one-eighth, and for other causes.

We start with the fact that Jones was owner of three undivided tenths in fee in possession, and owner of a life estate for the life of Mrs. Williamson in the remaining seven-tenths, and the plaintiffs owners of the remainder in fee in those seven-tenths after the end of the life estate, a vested remainder; and, in this condition of right to the land, Jones bored twenty-three wells upon the land, and produced from May, 1892, to December 21, 1895, six hundred and twenty-two thousand, two hundred and eighty-one barrels of petroleum oil therefrom, valued at five hundred thousand, two hundred and ninety-eight dollars. Did he have right to bore for this oil? He claims that he had, and that every barrel of it is his, without liability to account to the plaintiffs; while the plaintiffs claim that he had no right to bore and produce this oil, but, having done so, he must account to them for full seven-tenths. Did Jones, as tenant for life, have right to extract this oil? He had not. Petroleum oil, in its place in the land, is a part of the land itself, just as are coal, timber, and iron. *Bettman v. Harness*, 42 W. Va. 433, (26 S. E. 271); *Williamson v. Jones*, 39 W. Va. 231, (19 S. E. 436.) A tenant for life cannot do anything entailing permanent injury to the estate of the remainder-man or reversioner. He cannot, therefore, dig for gravel, lime, clay, stone, or the like; cannot open new mines for minerals. 1 Lomax, Dig. 54. If he take clay to make brick, not for repair of buildings, but for sale, it is waste. *University v. Tucker*, 31 W. Va.

622, (8 S. E. 410). It is the duty of the life tenant to protect the land from waste or injury even from others, and he must abstain from so doing himself. 1 Washb. Real Prop. p. 116, § 24; 1 Lomax, Dig. 57. Therefore, when Jones himself committed waste by boring for oil, he was a wrongdoer, so far as concerns his life estate. The remainder-men could sue him in an action of waste, as at common law under the English statute of Malbridge, or in action of trespass on the case under chapter 92 of the Code, and recover the full value of their seven-tenths.

It is sought to show that Jones, as life tenant, had right to all the oil, by the case of *Koen v. Bartlett*, 41 W. Va. 559, (23 S. E. 664), but that case will not sustain this claim. It asserts only that a tenant for life may use the land and its profits, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during its existence. There the owner in fee had made a lease for oil, with a royalty as rent, and then conveyed the fee, reserving a life estate, and it was held that he, as life tenant, was entitled, as against the remainder-man, to the royalty; but there the owner had authorized the boring for oil, and the conveyance was subject, in terms, to the lease, and, though the boring had not produced wells open at the commencement of the life estate, they were bored, under authority, during its continuance. We held that a mine bored in the period of the life estate, under prior authority, was to be deemed as if an open mine at the commencement of the life estate. It is established that an open mine may be worked to even exhaustion by the life tenant. *Crouch v. Puryear*, 1 Rand. (Va.) 258; 1 Lomax, Dig. 54. The offense of waste consists in the first penetration and opening of the soil, and it is not waste to dig in mines or pits already open, which have become part of the annual profit of the land. Tayl. Landl. & Ten. § 249a. When Jones penetrated the soil, he did so without warrant from his life tenancy, and without warrant from the creator of the life estate. There was no open well, no antecedent authority to bore one. *Koen v. Bartlett* is no help for him. It may occur that, if Jones could not, his life estate would be worthless to him. The oil might be drawn off by wells on an adjoining tract. As life tenant, he was entitled to none of it. Such is the quality of that estate.

Having seen that Jones, as life tenant, could not take this oil, we shall next inquire whether his right as owner in fee of three-tenths gave him right to do so. Jones was a tenant in common with the owners of the seven-tenths. By the old law one tenant in common was not liable to another for waste; but our Code of 1891 (chapter 92, § 2) has remedied this unreasonable rule by making tenants in common, joint tenants and parceners liable for waste. 1 Lomax, Dig. 499; 2 Minor, Inst. 620. Then we have simply to inquire whether the extraction of oil is waste, and under authorities above given we must answer that it is. Those acts which would be waste in a tenant for life would be between tenants in common. As the statute uses the law word "waste," we must give it the legal meaning as applied to tenants for life. *Elwell v. Burnside*, 44 Barb. 447. Chapter 100, section 14, Code 1891, gives an action of account between tenants in common for receiving more than his just share,—that is more than his just share of rents and profits from the legitimate use of land; but this has no reference to waste. It does not license waste. There stands section 2, chapter 92, branding it as a tort, and giving action for it, and it applies though one claim title to the whole, and commit waste. 28 Am. & Eng. Enc. Law, 895. As owner of three-tenths in fee, Jones could not bore for oil, any more than a stranger, because the act, whether done by a co-tenant or stranger, is a wrong. For this purpose he was a stranger, so far as the wrongful character of the act is concerned. He had right to possession for residence or other ordinary use working no injury to the inheritance, and therefore we term his act waste, not technically trespass as done by a stranger. "Waste is an injury to the freehold by one rightfully in possession. This marks the distinction between waste and trespass." 1 White & T. Lead. Cas. Eq. 1011. But the nature of the act is a tort in both cases; the same in both. Of course, a stranger would be liable for trespass; or, if he converts the oil from realty into personalty, the injured co-tenant may waive the trespass, and go for the value of the oil, or for the money for which the trespasser sold it. Indeed, Jones claimed to own the whole land, repudiated any co-ownership with the Hickman heirs, and thus assigned to

himself the position of a stranger. This, however, only strengthens the argument that he is to be regarded a wrongdoer against the owners of the seven-tenths, as the statute makes him a wrongdoer though he were regarded as a tenant in common. It is therefore immaterial to define his exact caste; whether we regard him as a tenant in common or stranger it is the same. If oil wells had been already opened, Jones, as co-tenant, might set up claim under his three-tenths interest to work them, and take all profits under some cases. [*McCord v. Mining Co.* (Cal.) 27 Pac. 863]; though I should think he would have to account under section 14, chapter 100, Code. *Rust v. Rust*, 17 W. Va. 901. That would be no wrong; not waste. His life tenancy would give him the right to take all the oil. But there were no oil wells on it, nor any precedent authority to open any. He first pierced the soil in quest of this fluid of fabulous wealth. He had no right to pierce it to get even his three-tenths of the oil. If he chose to do so, of every gallon seven-tenths belonged to the owners of the seven-tenths in the land, because it had been part of their soil. These considerations repel all idea that as owner of the fee in three-tenths he could penetrate the soil, and convert to his sole use, without accounting, all the oil raised. It is true, an expression in a former opinion in this case said that Jones, as owner of three-tenths, had right to bore for oil, so he took no more than his share. This is not announced as law in the syllabus. On examination I find no warrant for this expression. The only materiality for this is that it may be claimed to enter into the process of the accounting for the oil, as, if its extraction was lawful, the charge against Jones might be different from what it would be if regarded a wrongdoer. It is, however, sought to be made by counsel a weapon of great potency. Counsel say that this Court in the former opinion said that, the act of boring being lawful, and lawfulness of severance gave him who severed it the right to keep the whole, just as the right to use open mines by a life tenant gives him all the product, because he has right to sever. But in this case the severance is unlawful, and the legal deduction fails. Counsel from that expression would say further that when David Hickman, as owner of the seven-tenths, gave Mrs. Williamson a life estate, as he must have known as a matter

of law that the owners of the other three-tenths would have the right to produce oil, he must be understood as contemplating that they might do so, and is to be taken as intending, if they did, that the life tenant should enjoy all the seven-tenths of the oil. As the owners of the three-tenths had no such right, the argument here again fails. In addition, this would give the life tenant, by mere implication (remote and weak implication at that), a right to what her devise did not carry as an incident,—things a part of the soil, which can only go with it by express grant. It is argued that Hickman, in his devise of a life estate to his favorite daughter, Mrs. Williamson, did not prohibit waste; but as Judge Roane said in *Findlay v. Smith*, 6 Munf. 148, exemption from waste cannot result “from the omission to restrict waste in the will. That omission became unnecessary from the limited nature of the estate granted. The estate granted was only an estate for life, and it is incident thereto that waste shall not be committed. It would have been a work of supererogation to have inserted such a restriction, and the question may properly be retorted, why, if it were so intended, was not waste specially permitted by the will? This is not only not done, but the contrary is done, by granting an estate which carries with it the restriction as an incident. The silence of the will, in this particular, cannot weaken the rights of those in remainder. It cannot destroy rights conferred by law.” At one time, to restrict a life tenant from waste, there must be a restriction in the grant; but now all tenants are forbidden to do waste by statute, unless their grant render them expressly unimpeachable for waste. 2 Minor, Inst. 616, 619; 1 Lomax, Dig. 56; 1 Washb. Real Prop. 107. Of course, when that which is a part of the realty is unlawfully severed, it belongs to him who has the first vested estate of inheritance at the date of severance, as he owns it. *University v. Tucker*, 31 W. Va. 621 (8 S. E. 410); Fearn, Rem. 341; *Whitfield v. Bewit*, 2 P. Wms. 240; 1 Lomax, Dig. 56. The owner of the severed chattel can alone seize it, or bring trover for its conversion, as it came from the inheritance, or claim the thing itself by replevy, or detainue, or bring trespass *de bonis asportatis*, for damages for the taking of it, or *assumpsit* for money had and received from it. “Nor does it matter

whether the timber is cut by a stranger or by the tenant (for life) himself, since the tenant cannot convey any interest in it when severed." 1 Washb. Real Prop. 119; 1 Lomax, Dig. 59; Freem. Coten. §§ 297, 302. For the same reason the co-tenant doing waste neither owns nor can sell what is not his. "If at the time of the improper working there is any person in being entitled, defeasibly or indefeasibly, to an estate of inheritance, the property in the severed chattels, or the amount to be accounted for, will belong absolutely and immediately to such person, or, if more than one, to the first of such persons, and his right is not affected by the circumstances that between his estate and that of the wrongdoer is interposed in the order of the limitations an estate for life in being even without impeachment of waste." McSwinney, Mines, c. 3, § 2 (B). p. 99; 1 Lomax, Dig. 56, 57; *Pigot v. Bullock*, 1 Ves. Jr. 479; *Birch-Wolfe v. Birch*, L. R. 9. Eq. 683. This shows that Jones, as owner of the life estate intervening before the seven-tenths would be vested in possession could not keep the oil. "Oil in the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrongdoer the title of such owner remains perfect, and he may pursue and reclaim it wherever he may find it." *Hughes v. United Pipe Line*, 119 N. Y. 423 (23 N. E. 1042). It may be said that these doctrines would leave the part owner powerless to get any benefit from the oil. If so, it must be as a quality of his estate. But it is not so; for, if he wished a partition, he was entitled to it, and thus could bore on his separate share, and take the oil on it, and perhaps drain all from the other, and hold it acquit of account for it; and, if he did not wish partition, oil being capable of loss from wells on lands near by, perhaps he could ask a court of equity to allow him to bore, and take his share of the oil, and pay the balance to the remainderman, like that jurisdiction exercised by equity to direct timber in a state of decay to be cut down for the benefit of those entitled to the inheritance, if it would do no damage to the life tenant, compensating him for the use of the land. Here Jones was himself the life tenant. 1 Lomax, Dig. 60; Story, Eq. Jur. § 919. Thus the owners of the seven-tenths in the land had plain legal title, and their rights are such as above given to seven-tenths of the oil,

unless something not yet considered debars them from such rights.

It is urged strenuously, with great elaboration and ability, by counsel, that they are barred by the doctrine of estoppel *in pais*; that their conduct works this result. Here I first remark that a clear legal title to land, requiring written conveyance to transfer it, is, by this theory, to be devested out of its owners, and invested practically as effectually in others as if such conveyance existed. A clear, strong case of estoppel is required for such a result. What is the conduct of these parties bringing about this result? As to Mrs. Williamson, she having procured the decree of sale, and received its proceeds, is estopped. That is *res judicata* under our former decision. As to the other devisees of David Hickman, what have they done or left undone to estop them? It is said they ought to have made themselves parties to this suit. There is no force in this. Perhaps they did not want their land sold. There was no ground for the sale of their remainder for the debts of Thomas Jones, deceased, except perhaps one of their seven-tenths, as Jones' heirs had conveyed their interest before the suit. If anybody wanted to sell their land for debt, or because partition could not be made, or other cause, he must bring them and their estate before the court. Strange that any one is to lose his land because he did not cause himself to be sued. Counsel for Jones make their chief point under this head of estoppel by saying: "Because these plaintiffs stood by for eighteen months, and made no claim to the land or oil, knowing that Capt. Jones in good faith, and believing he had a perfect title in fee simple to the farm, was making great expenditures on the land in developing it as oil territory, and had paid forty thousand dollars to buy interests of his co-purchasers, Tennant and Haskell, and paid up the deferred installments of the purchase money for the land, which he would not have done unless he had believed that he had the sole and unquestioned title thereto, the said plaintiffs intending, if Captain Jones succeeded in developing the farm as oil territory, to bring this suit. If he did not succeed, they would let the sale stand without attack, and they would finally take and enjoy the avails and proceeds of the

same." By no means does the evidence sustain these predications.

Admit, however, these as facts, they do not bar the plaintiffs. *First*, they do not predicate, nor does any evidence, any contract between the parties, giving Jones a right. The plaintiffs stand in no wise bound to Jones by any contractual relation. Then, to bar them, you must show such conduct as is misconduct amounting to fraud, and this is not shown by these facts, or others in the circumference of the case. Most of the cases cited to support this estoppel are cases in which there was privity or obligation springing from contract, or constructive or other trust. Such are *Clark v. Hart*, 6 H. L. Cas. 633; *Sumner v. Seaton*, 47 N. J. Eq. 119 (19 Atl. 884); *Gallihier v. Cadwell*, 145 U. S. 372 (12 Sup. Ct. 873). There is no contract or trust here. Not the slightest obligation under contract, trust, or fiduciary relation bound these Hickman devisees to Jones. Let us see what is an estoppel by conduct. Let us see whether the defendants can meet its requirements. "An estoppel *in pais* operates where a person has made an admission or done an act with intent to influence the conduct of another, or that he has reason to believe will influence his conduct, inconsistent with the evidence he proposes now, or with the claim or title he proposes to set up, where the other party has been influenced by and has acted upon it, and where he would be prejudiced by the allowance of the claim or title set up." JUDGE ENGLISH in *Railroad Co. v. Perdue*, 40 W. Va. 454 (21 S. E. 755), says that for an estoppel *in pais* there must be conduct, acts, language, or silence amounting to a representation or concealment of material facts, and the misrepresented or concealed facts known to the party sought to be charged with the estoppel, and unknown to the other party, and the conduct must be with the expectation that it will be acted on, or will likely be; and JUDGE ENGLISH further said: "The general rule is that, if a person interested in an estate knowingly misleads another into dealing with it, as if he were not interested, he will be compelled to make his representation good. It applies to one who denies his own title or incumbrance when inquired of by another who is about to purchase the land, or loan upon it; to one who knowingly suffers another to deal with

the land as though it were his own, or to expend money in improvements without giving notice of his own claim or the like. In the light of the most recent decisions, to preclude the owner of land from asserting his legal title under such circumstances, there must be shown either actual fraud or negligence equivalent to fraud in concealing his title, or that he was silent when the circumstances would compel an honest man to speak." The plaintiffs never accepted a dollar of the sale of the land under the decree. These plaintiffs were not at the judicial sale, standing by silent, or at the place of improvement; never said a word denying their title; never renounced it; never induced Tennant or Jones to buy or bore, never were inquired of as to their title, never were placed in such circumstances as to call upon them legally, nor perhaps even morally, to speak out. All they are guilty of is silence, quiescence. They did not, it is true, seek Jones, and warn him. This is their offense, in length and breadth. Under the doctrine of estoppel above given, this is not enough. Bigelow, *Frauds*, 590, says: "Having now considered the subject of deception by act on all sides, we are next brought to the subject of deception by omission; in the case of silence, where there was a duty to speak. Now, silence alone, it may be declared as a general rule, is not unlawful in transactions between men at arm's length, however great the advantage gained thereby. A man's unpublished thought is surely his own. But it must be understood at the outset that by silence we mean entire silence, as distinguished from that sort which merely keeps back part of the truth told or suggested. But, speaking of pure silence, the general rule stated is very strong. It governs even though the silence is meditated, and with knowledge that the other party was laboring under mistake or ignorance." These people were not bound to volunteer to warn Jones, and we can the more excuse them for silence and inaction—all they are guilty of—when we reflect that, if they knew anything about the title's condition, they knew Capt. Jones held the life estate, and they would have no right to possession until its end, which exculpates them from any animadversion for intentional wrong.

Again, it is not clear they knew their title, especially as some—nearly all—were infants and married women. If a

business man like the defendant could not judge correctly of his title, could they? Moreover, I say that if one man chooses to go upon another's land, and clear and improve it, the mere failure of the owner to go to him and warn him not to do so will not take away the true owner's title. He is given the time fixed by the statute of limitations, though he do know that his adversary is expending money in improvements. He may every week pass along and see the work. Mere silence will not rob him of title until time does the work under the statute. Unless there is a duty to speak out, one need not. "To create a duty to speak, it must be known by the one keeping silence that some one is relying on that silence, and is either acting or is about to act as he would not have done had the truth been told." *Veile v. Judson*, 82 N. Y. 40. There is no proof that these parties knew Jones was relying on them or their silence, and in fact he shows himself he did not. But I say the test just put in the New York case is not strong enough. Mere silence and knowledge that another is relying on it is not enough. He must be brought into such close quarters or situation towards him as to call on him to speak out. Again, a potent fact against Jones on this estoppel is that before Tennant, who, as his agent, bought at the judicial sale, Jones knew of the defect of the title.

1. The record in the cases stated that Thomas Jones died leaving ten heirs; and the petition of Engle and Williamson, on which the sale of the whole tract was first based, stated that Eliza Williamson only owned a life estate in seven-tenths. Who owned the remainder? The very decree of sale declares: "It appearing to the court that the interests held by C. Engle as trustee as aforesaid are for the use and benefit for life of Eliza Williamson by virtue of a provision in the will and codicil of said David Hickman." Who owned the remainder? This record put this question to a purchaser. Prudence would make a man inquire where the real estate in the land was. A purchaser at a court sale purchases under the rule of *caveat emptor* (look out buyer). The court or commissioner warrants nothing. One buying at such a sale is held—conclusively held—to have notice of all the facts which the record, if inspected, would communicate. *Stout v. Mercantile Co.*, 41

W. Va. 339, (23 S. E. 571); Pom. Eq. Jur. § 626; *Wood v. Krebs*, 30 Grat. 708; *Burwell v. Fauber*, 21 Grat. 446. Where one claimed for improvements, such record notice was held enough to debar him as showing that he did not improve with *bona fide* belief that his title was good. *Hall v. Hall*, 30 W. Va. 785, (5 S. E. 260). Jones had actual notice of this defect of title, and of the fact that the plaintiffs owned the seven-tenths as the remainder. He, as a witness, says his agent, Tennant, to procure oil leases, reported to him that a lease of this land from Mrs. Williamson would not be safe, "as she only owned part in fee and a life interest in the balance," and the only way was to buy it. This knowledge defeats his plea of estoppel under cases cited above, and *Bettman v. Harness*, 42 W. Va. 433, (26 S. E. 271), and *Dawson v. Grow*, 29 W. Va. 333, (1 S. E. 564). A small modicum of prudence would have saved him. He heeded not this warning, but venturesomely risks a purchase, and the expenditure of his money. He was not moved by any words or act or representation of the plaintiffs, nor by their silence, but hazarded his action in the spirit of speculation, not relying on their silence, but his own judgment. Jones says he claimed the whole, and would not have heeded the claim of the plaintiffs, if they had made it. It would not have stopped this expenditure. How can he lay his misfortune at their door? His counsel argue that the commissioner who sold, told him it was a good title. Jones says he did not say he did so until July, 1893, and he had then bored all but two or three wells. But, what if he did? Are these plaintiffs responsible, even if the lawyer told him that it was not necessary to make the remainder-men parties? This mistake, in legal opinion, does not bind the plaintiffs. He was not their lawyer. He had no authority, as commissioner, to bind them, or guarantee title, and they were not parties to the suit even. It is argued that the sale was made under decree with the knowledge and desire of the remainder-men, and this position is sought to be supported on circumstances entirely inadequate to sustain this contention. The judge who rendered the sale decree was father to children of one of the remainder-men, the commissioner was husband to another, and a son of David Hickman performed the clerical work of recording the de-

cree; and the remainder-men must therefore have known of, and been satisfied with, the decree, say counsel. This does not follow. Suppose they did know it, and were satisfied. If they did nothing active, it is not enough. One with legal title to land cannot, by oral disclaimer of right, even the most expressed, divest himself of legal right. *Cline v. Catron*, 22 Grat. 378; *Jackson v. Davis*, 15 Am. Dec. 451.

Counsel would explain why these remainder-men were not made parties, saying the lawyer in the case thought, as Jones' heirs were parties, and Mrs. Williamson owner of a life estate in seven-tenths and three-tenths in fee, they were not necessary parties, as Hickman purchased shares of Jones' heirs after his death, and they were liable to his debts. They were not liable, except one of the seven-tenths; and anyhow they owned legal title to the remainder in fee, and were absolutely necessary parties, and neither they nor their estate were before the court, and their estate was not sold under the decree, and it was a nullity as to the remainder-men. No matter who made the mistake in the conduct of the suit, or how it came about, it could not prejudice these remainder-men. They can be bound only by record, not by a mere supposition, or even proof, that they knew or approved of it. The decree and deed under it conveyed no title. Mrs. Williamson, though before the court, was only life-tenant of the seven-tenths, and there is no privity between life tenant and remainder-men, so that the presence of a life tenant as a party by representation makes the remainder-man a party. "A stranger, who is not a party or a privy, can neither be barred nor aided" by a judgment or decree. Bart. Ch. Prac. 218; 2 Pom. Eq. Jur. § 813. Engle was a dry trustee; the real owners of the remainder were the remainder-men. The trustee could not represent their interest. Even a creditor under a deed of trust, not merely a trustee, must be a party; much more the remainder-man in a case of dry trusteeship, where it is proposed to sell the very *corpus* or fee of the land, and all rights whatsoever therein. It is essential that there be before the court not merely the owner of particular estate, but also the owner of the first vested estate in reversion or remainder, and this was in these remainder-men. 1 Daniell, Ch. Prac. 227, 228;

Story, Eq. Pl. §§ 144, 145; Opinion, *Faulkner v. Davis*, 18 Grat. 684. The trustee and life tenant not representing the remainder-men, and they being necessary parties to bring the fee of the land before the court, they are not bound by the sale. But this was decided on the former decision. Counsel ask, why, if the plaintiffs did not acquiesce in the sale, did they not adduce evidence to show that they did not? The burden to show acquiescence is on the defendant asserting it. Mere acquiescence, if proven, would not divest their title. If these parties knew of the sale and baring, which is only by mere inference, there is evidence tending to show that they thought it was only Mrs. Williamson's interest that was sold, as she is shown to have been anxious to get rid of the land. It is not clear they knew of it; but, what if they did? Can their land be taken from them merely for that? So I conclude that estoppel *in pais* will not defeat the plain, legal right of the plaintiffs. But, as some of them were infants and married women, even if there were facts to show such estoppel as is here contended for, it would not bind the married women or infants. They would not be guilty of such a fraud as would estop them.

The title of these plaintiffs vested before April 1, 1869, and therefore the interests of the married woman were not separate estate. A distinction is made in a brief between land that is separate estate and that not separate estate, the theory being that as to separate estate the married woman may lose it by estoppel *in pais*, whereas she cannot so lose land not separate estate; but as, under our statute, her sole deed is void in both cases, and she could only pass either class of land by a deed with privy examination (when this transaction occurred), and now by acknowledgements, her husband joining, I do not see where any distinction comes in. Whether a married woman, by positive, intentional fraud, can lose her land, when her sole deed will not divest her of it, the authorities are divided. I should say that, as the law scrupulously limits her power of alienation to one only mode, she could not do so; that she could not do indirectly what she could not do directly by a solemn deed, because it is the policy and positive provision of statute that she shall be disabled by an act of hers to part with her land except in one way. Bige-

low, Estop. 599; Bish. Mar. Wom. § 488; 2 Herm. Estop. § 1102. Note that I am speaking of her losing her land, not personalty, for I think she may thus lose her personalty, as she is competent to sell that. But in this case no affirmative act of fraudulent representation is shown; only silence. If I be right in the position that actual fraudulent representation would not lose her right, for stronger reason mere silence would not; but, even if positive, affirmative fraud would lose her land, mere silence would not. 14 Am & Eng. Enc. Law, 643, says that, as "such estoppels as arise out of failure to assert a right, or out of silence or acquiescence in the right claimed by others, arise only because from such silence and acquiescence a representation is implied, it is clear that a married woman can be bound by silence and acquiescence only in cases where she would have been bound had she expressly made the statement implied. Thus, where a married woman makes a void deed, she is not estopped, by afterwards recognizing its validity, and allowing the grantee to improve the property, from asserting her title, for she would not be estopped therefrom by expressly telling the grantee that she would never claim any title thereto; but, if she could contract as a *feme sole*, and allowed the grantee to improve the property on the faith of a title given him by her, she could not deny the validity of that title." It is cautious to observe that the law books say that, in order that a fraud by a married woman shall constitute an estoppel against her, it must be unconnected with a contract, because, as her contract would be void, her mere conduct connected with it would not operate to enforce it; but that was when she was disabled from contracting; and, now that our statute has fully enabled her to contract, I think that any fraudulent act which would estop her when not connected with a contract would also do so though connected with a contract. This limitation proceeded from her disability, and, that having been removed, the limitation would be removed. Bish. Mar. Wom. § 493; 1 Pom. Eq. Jur. § 418; *Tufts v. Copen*, 37 W. Va. 629 (16 S. E. 793). But observe, further, that as to selling and conveying her land she remains under limited disability. Wherefore I am clearly of opinion that the mere silence or inac-

tion of the married women—their quiescence, for it is not acquiescence—does not bar them.

How as to infants? Positive intentional fraud would bar an infant of years of discretion, but mere silence or quiescence surely will not. I think the weight of authority is that matter sufficient to raise an estoppel, if unconnected with a contract, would bar an infant from asserting a right even to land. It must, however, be intentionally fraudulent. Mere silence or quiescence, as in this case, will not do so. Bigelow, *Estop.* 600; 2 *Pom. Eq. Jur.* § 815. The deed of a married woman is void; an infant's only voidable,—a difference.

I have discussed the question whether or not the plaintiffs are barred by the doctrine of estoppel *in pais* as an open question unaffected by the former decision, though it may be said plausibly that it did decide against that defense, in deciding that Jones must account on some basis. If a good bar, he would not have to account, and the court would have dismissed the bill. That decision did not decide finally that Jones rightfully bored for oil. It did not decide how much Jones should be charged, nor on what basis. That decision was, in terms, in these matters, not final, but provisional.

There cannot possibly be anything in the contention that laches bars relief. The delay from the judicial sale was only eighteen months; from the commencement of boring, some less. The statute of limitations gives ten years. The many cases of laches cited are cases of deeds or other things procured by fraud, as in *Whittaker v. Improvement Co.*, 34 W. Va. 230 (12 S. E. 507), where there must be promptness. Here is no such case, but simply one in adverse claim of another's land, or ouster by one tenant in common, or a suit to make Jones account for oil taken from the land; the statute giving five years. Why, in such case, plead laches short of the period fixed by statute? Viewed as a suit to recover possession,—but it is not,—time would not begin until the end of the life estate. *Merritt v. Hughes*, 36 W. Va. 357 (15 S. E. 56); *Arnold v. Bunnell*, 42 W. Va. 473 (26 S. E. 359). Time has no weight in any view of this case.

Having reached the conclusion that the plaintiffs have right to relief, the next question is as to what shall be

charged to Jones, or the mode of account. It is not questioned, but may be stated as law pertinent to the case, that, though action at law in case for waste, or trover, or trespass *de bonis*, or perhaps pure trespass would lie, yet equity can take the account. It has indubitable jurisdiction for an injunction to restrain the waste. *Bettman v. Harness*, 42 W. Va. 433 (26 S. E. 271); *Williamson v. Jones*, 39 W. Va. 231 (19 S. E. 436). Having jurisdiction for one purpose, it will go on to do complete justice to avoid multiplicity of suits. *Chrislip v. Teter* 43 W. Va. 356 (27 S. E. 288). And with respect to a suit of this particular cast to enjoin waste, it is clear equity will take an account, and give compensation for damages. Story, Eq. Jur. § 517; 1 Washb. Real Prop. 126. As above stated, Jones had no right to any of the oil as life tenant. As owner of the three-tenths of the land, he had no right to produce the oil, and his act in so doing was one of waste. When he did extract the oil, seven-tenths of it was by right and title oil of the plaintiffs, the very oil itself, because taken from their land. Jones converted this, their property, to his own use. They are entitled to recover the money he received for it, if ascertainable; if not, its value. It is urged that in a former opinion it is said that Jones had right to bore, so he did not take more than his share of the oil. Would not that leave the balance the property of the plaintiffs? I do not see that this expression that he had right to bore is material, unless it show, as counsel seeks to use it, that having the right to bore, Jones had the right to keep all the oil; but that the opinion in words denies. The plaintiffs owned seven-tenths of the oil when it reached the surface. It has been converted to his own use by Jones. He claiming all the land, would be an ouster, took the oil under adverse hostile claim, as an act of trespass. Indeed, the plaintiffs can treat it as an ouster. It is not a question of rent in the shape of royalty of one-eighth of the oil or otherwise, for royalty is rent, and springs from contract; and there was nothing contractual between these parties. If a stranger had bored, could the plaintiffs not render him liable for the conversion of their oil? Jones is as a stranger, a hostile claimant shutting them out; and, even if he had not claimed the whole land, but acknowledged their right to part of the land, the

taking of the oil was waste, and gave him no right to their share. The former opinion says this.

It is claimed for Jones, if he is not allowed all the oil, he should pay only one-eighth of the seven-eighths as royalty. If he had worked already open wells, it might be more plausible to say so; but he first penetrated the soil as a wrongdoer, in a legal view. If an open well, it would be lawfully used by a life tenant, and probably by a tenant in common, as one mode of enjoyment of his share. I say probably. That matter is not before us. *Rust v. Rust*, 17 W. Va. 901, holds that where one tenant in common occupies the whole property he is liable to co-tenants for a reasonable rent for it in the condition it was in when he took possession. This is approved in the opinion in *Dodson v. Hays*, 29 W. Va. 601 (2 S. E. 415). This doctrine follows *Early v. Friend*, 16 Grat. 21. In the two West Virginia cases the use of the land was for ordinary purposes, not extracting minerals, and the occupying tenant had right to occupy and farm the land. The *Early Case* was the use of a salt well opened before the commencement of the co-tenancy, and perhaps the use of the salt water in making salt by the occupying tenant was lawful, as the use of the land in the condition it was in when he went upon it, and as it had been used by the ancestor. And besides, between him and some of the co-owners, there was a stipulated rent, which the judge gives as a reason for the charge of a rent; and besides he says the occupying co-tenant and the others regarded it as a renting. And the court refrained from laying this down as an inexorable rule, saying there might be cases calling for an account of rents and profits. The case in hand is a case of a different hue; not the case of one cropping the land in that legitimate use which a tenant in common may make of the land; not use of open salt or oil well, which likely can be used by one tenant as it had been before; but where one pierces the earth, and takes from its place oil that is a part of the realty,—an act not of legitimate use, but destruction and waste of the inheritance of the others. Almost an exactly similar case to the one in hand is *Ruffners v. Lewis' Ex'rs*, 7 Leigh, 720, where persons claiming adversely to plaintiffs were held tenants in common with them, and had sole occupation, and had discovered salt,

and bored wells. Great controversy arose as to the mode of charge against them. Held chargeable, not with rental, but rents and profits, if any made, with credit for expenses and improvements. *Graham v. Pierce*, 19 Grat. 28, is like unto this case. It was a case of lead mines, where parties jointly operated them for a time, and one continued to use the open mines. President Moncure said: "The court is further of opinion that although, as a general rule, where one tenant in common occupies and uses the common property to the exclusion of his co-tenants, or occupies more of the common property than his just share or proportion, the best measure of his accountability to his co-tenants may be their shares or proportions of a fair rent of the property so occupied and used by him, according to the principle laid down in the case of *Early v. Friend*, 16 Grat. 21, 52, yet, as was said in that case, there may be peculiar circumstances in a case, making it proper to resort to an account of issues, profits, *etc.*, as a mode of adjustment between the tenants in common." *Id.* 54; *Ruffners v. Lewis' Ex'rs*, 7 Leigh 720." "Under the circumstances of this case it was proper to resort to an account of issues, profits, *etc.*, as a mode of adjustment between the tenants in common. It is not a case of land used for agricultural purposes only, in which there is no difficulty in ascertaining a fair rent for the use and occupation; nor is it such a case as that of *Early v. Friend*, where the property consisted of salt works, the yearly value of which might be ascertained with reasonable certainty, and where a money rent had been contracted for and paid to some of the tenants in common, which furnished a standard for ascertaining the amount due to others; but it is the case of a lead mine, the yearly value of which, and more especially of an undivided and uncertain portion of which, is incapable of ascertainment. Nor would it be just, in settling the account of issues and profits, to charge the occupying and operating tenants with a certain sum *per* ton for the quantity of ore raised from the mine, or to credit them with an estimated sum *per* ton for raising the ore and manufacturing the lead, as contended for by the appellants. Such a mode would be founded on conjecture merely, and would be very unequal and unjust, as it could not be known what would be the cost of raising ore, which would depend upon its situation in the mine, its

degree of richness, and the facility or difficulty of getting at it, as well as upon the uncertain price of labor; nor what would be the cost of manufacturing lead, which would depend upon the varying price of labor and supplies. The best mode of settling such an account, and one which is perfectly just, supposing the tenant to have been capable and faithful, is to charge him with all his receipts, and credit him with all his expenses, on account of the operation of the mine." If the difference in the nature of a lead mine and a salt works was such as to require in the case of the former an account of rents and profits, with how much more force are we driven to the conclusion that in a property such as that in the case at bar; consisting of oil wells, the yearly value of which was still more uncertain and difficult of ascertainment, in which the cost of operation is still more uncertain than that of the lead mine, the account must be taken as one of rents and profits.

In *Newman v. Newman*, 27 Grat. 722, the court had to determine the basis of an account between co-tenants of an iron mine. On pages 722 and 723, President Moncure refers to the cases of *Graham v. Pierce*, and *Early v. Friend*, and quotes from *Graham v. Pierce*, the distinctions between the two cases there stated. The opinion says: "That was the case of a lead mine, while this is the case of an iron mine; and there seems to be no difference in principle between them on the subject we are now considering. A tenant of such property necessarily uses a part of the subject itself, and maybe such uses render the residue of the subject of little or no value. It may be discovered by explorations and operations that the property is of great value, or the contrary. To rent it for a certain sum is to make a bargain of speculation and hazard, which is always objectionable in such cases, as it is almost sure to operate unequally on the parties; whereas to carry on operations upon it for the joint and equal benefit of all the owners in proportion to their respective interests in the subject, and by the agency of persons (whether they have an interest therein or not) who may be amply compensated for their trouble, complete justice will be done to all parties concerned. It may be said that to carry on the business required a capital, which one of the parties did not have. But that matter may be adjusted by allow-

ing interest to the party who advances the capital. In this case the property was of known and established value, and there would probably have been no difficulty in finding a suitable agent, and borrowing the necessary capital to carry on the operations, even if both had not been readily furnished by one of the parties." As counsel say: "Here are pointed out other facts which are also found in the case at bar, and which, it seems to me, are controlling, and require the application to this case of the rule in *Graham v. Pierce*. These facts are that the development of oil property necessarily uses part of the subject itself more rapidly and completely than in the case of a lead mine, and renders the residue of the subject of no value whatever. It is even more true of an oil well than a lead mine that explorations and operations may show that it is of great value, or the contrary. The speculation and hazard are more in the case of an oil well than in that of a lead mine. Indeed, all that is said by Judge Moncure in *Newman v. Newman*, as quoted above, is applicable with added force in the case at bar. In both the Virginia cases in which a rent was charged (actually in one, nominally in the other) the property consisted of open mines, and the parties interested had theretofore settled accounts on the basis of a rent. Neither of those facts exist here, where the wells were not open; no rent had theretofore been charged, and the inheritance itself was being taken."

In *Dodge v. Davis*, 85 Iowa, 77, (52 N. W. 2), an instruction was held proper (pages 81, 82, 85 Iowa, and page 3, 52 N. W.) that a tenant in common was entitled to recover from a defendant co-tenant, who had ousted him, claiming exclusive right to use the land, in addition to a fair rent for the use of the premises, his share of the fair market value of the trees or timber, if any, that defendant sold to third parties off of said land. In *Huff v. McDonald*, 22 Ga. 131, relating to a gold mine, it was held: "A tenant in common, who receives more than his share of the profits of the common property, holds the surplus as bailiff for his co-tenant, who therefore stands to him as principal. He consequently is bound to pay his co-tenant the actual profits which he has made out of such surplus, as well as the surplus itself." In *Hayden v. Merrill*, 44 Vt. 336, the defendant co-tenant was held liable for profits, and not for

rent. In *Shepard v. Richards*, 2 Gray 424, the inquiry was to the profits received, not the rent due. In *Pearson v. Carlton*, 18 S. C. 47, an account for rents and profits (page 49) was held proper (pages 53, 54). This was a case where land was sold under decree where an heir was not a party, and he was given partition and rents and profits. That case refers to *Jones v. Massey*, 14 S. C. 292, which held that the accounting should be of rents and profits, and not of rental value. Such was the accounting in *Dewing v. Dewing*, 165 Mass. 230, (42 N. E. 1128). In *Winton Coal Co. v. Pancoast Coal Co.*, 170 Pa. St. 442, (33 Atl. 111), the court, after construing the statute of Anne, say: "Where the co-tenant has actually received the rent of the common property, or has converted coal, timber, gas, oil, or minerals—part thereof—into cash, and retains a share thereof which actually belongs to his co-owner, there would seem to be no good reason why, in a proper case, he may not be sued in *assumpsit* for his co-tenant's share thereof." See also, *Fiquet v. Allison*, 12 Mich. 328; *Loomis v. O'Neal*, 73 Mich. 582, (41 N. W. 701); *Tuttle v. Campbell*, 74 Mich. 662, (42 N. W. 384). "In *Job v. Potton*, L. R. 20 Eq. 84, the court regarded the defendant co-tenant as having been in all respects blameless, not a willful wrongdoer against whom the accounts would be taken rigorously, not negligent or tortious; so that, while he would be allowed for bringing the coal to the pit's mouth, but not for the expense of severance, but as having produced the coal in the exercise of a strict right (page 97), and decreed an account against the defendant for the value at the pit's mouth of the coal raised, less the cost of getting and raising it. The idea that he should be dismissed on payment of a rent does not seem to have occurred to any one."

It does seem to me on authority and reason that an account of rents and profits is the true basis. I cannot see how, where there is no lease, no contract, no tacit understanding between the parties, no past mode of business, but one not the true owner has used and received rents and profits from land of other people, you can charge an annual rental, and not their fraction of rents and profits received by the occupier.

What is to be done with the money to which the plaintiffs are entitled? Does it go to them at once, or is it to be put at

interest, and Jones, as life tenant, get the interest on it, during Eliza Williamson's life, or a certain sum for its present worth?

As above shown, by reference to *McSwinney on Mines*, it goes at once to the plaintiffs, and Jones has no right to interest on it during the life estate: (1) Because he is, in a legal point of view, a wrongdoer, and, if given interest, this would give him the benefit of his own wrong. In *Williams v. Duke of Bolton*, 1 Cox, Ch. 72 (3 P. Wms. 268), a tenant for life committing waste, who owned the next existent estate of inheritance, subject to an intermediate contingent remainder, was not allowed to take advantage of his own wrong in cutting timber, but the fund was kept for the contingent remainder-men, and he was made to pay interest on it from the time the money for the timber was received. There are instances where the reversioner or remainder-man, during a life estate in another, wrongfully severs minerals, the proceeds are invested, and the income paid to the life tenant during life, though the minerals really belonged to the wrongdoer, because he could not take advantage of his wrong against the tenant. *McSwinney, Mines*, 65. This is doubtful, but shows how far courts go against one doing the unlawful act.

(2). Jones is not entitled to interest, because he did not own a drop of the oil belonging to the owners of the seventenths. He is not entitled to the oil, and, of course, is not entitled to the income of interest from its proceeds.

The decree gave the collateral heirs of Dr. Weirich, husband of Laura Weirich, shares in the amount charged to Jones for the oil. I think this was error. Laura Weirich was a child of David Hickman, outliving her father, dying childless, leaving her husband, to whom by her will she gave all her interest in the estate of her father, "both as legatee and residuary distributee under his last will." The will of her father gave her a legacy of six hundred dollars and some silverware. By clause fourteen he provided that his real estate not before disposed of (and this land had been given to Mrs. Williamson for life with remainder to her sisters) be sold, and out of it and his personalty his debts paid and the bequests he made, and the residue divided equally among his daughters, among them Laura Weirich. The will of Laura Weirich would give her husband her legacy of six hundred dollars and the silverware, and her

share in the residue arising from the sale of land and personalty, as the words, "both as legatee and residuary distributee," would in their legal import imply. They are subjects fitting those words in their legal meaning. She gave, too, "subject to certain devises and bequests herein-after to be made," but made bequests,—no devises,—but used improperly the word "devise" in making bequests, tending to show still further that she had her mind on personalty, not realty. Her will gave nothing in this land. Hence her husband got no interest in this land, and she died intestate as to it; and as she died before the Code of 1868, and under the reign of clause 3, s. 1, c. 123, Code 1860, it would go to her sisters, the plaintiffs, not to the husband, under section 1, cl. 2, c. 78, Code 1868. And besides, she died under Code 1860, and chapter 122, s. 3, allowed a married woman to make will only of her separate estate; and this was not separate estate, because it vested in her before our first separate estate act (chapter 66, Code 1868).

As to the alleged error in not decreeing that the purchase money under the judicial sale, paid by the purchaser, be refunded to the purchaser, that was not cognizable in this case, but by some proceeding or step in the case in which the sale was had, or other independent proceeding, whatever it may be.

This decision may be burdensome to Jones, who appears to be a man of great energy, business capacity, and merit, and I will not conceal the wish that we could, consistently with law, be more favorable to him; but we are bound by the law, seemingly very plain, and in itself logical and well established. The plain and simple showing of the voluminous record and contestation in this case is that he has taken sole and exclusive possession of land belonging in greater fraction to others, and of his own accord drawn from it vast quantities of oil belonging to them in clear law, and sold it, and reaped rich return, and the true owners demand their own under the law. If he was mistaken in his own judgment as to the title, or from misadvice, it is a misfortune that is to be regretted, but for which the plaintiffs are not legally responsible; and if he knew of the defect of title, and he surely had enough to warn him and put him upon inquiry before embarking in

large expenditures, it seems only rashness, or rash speculation. In fact, however, the returns bored the wells after the first.

I have said so much only in consideration of the pecuniary magnitude of the case, and in deference to the elaboration, in the oral arguments and briefs of distinguished counsel, of the points involved in the case, which do not seem to me to be very difficult of solution, up to this point. As stated above, the charge against Jones is to be by rents and profits, not by annual rentals; but this presents a question which has given me great perplexity, and this is the question, what shall be credited to Jones against rents and profits?—especially whether he shall be repaid expense of boring wells. Where one man, in possession under a hostile defective claim or title, makes permanent improvements, the common-law gave him no pay for them, as he voluntarily put them upon the land of another; but our Code (chapter 91) gives compensation therefor if, when the improvements are made, there is “reason to believe the title good under which he or they were holding.” As shown above, warning was given Jones by Tennant, his agent, and by the record under which he purchased, of the rights of the plaintiffs, and our Court has held that this notice precludes allowance for improvements. *Hall v. Hall*, 30 W. Va. 779 (5 S. E. 260); *Dawson v. Grow*, 29 W. Va. 333 (1 S. E. 564); *Cain v. Cox*, 29 W. Va. 258 (1 S. E. 298); *Id.*, 23 W. Va. 613. Good faith would seem to be the test, but these cases affect Jones, legally speaking, with a notice repelling good faith; and yet there is good ground for saying that, as a matter of fact, Jones, from misadvice as to the law, thought he was buying a good title. People generally think that a court sale always gives good title, whereas often it does not. Therefore, viewing Jones as an adverse claimant, or as one who, being really a tenant in common, yet takes sole possession, denying the claim of all others and claiming the entirety, and taking exclusively all rents and profits, it is difficult to accord him compensation consistently with dry law. Even where one joint tenant or tenant in common, not claiming the whole,—not denying his fellow’s right,—makes permanent improvements, without his fellow’s consent, he cannot charge him, nor hold exclusive possession until reimbursed

by rents and profits. *Ward v. Ward's Heirs*, 40 W. Va. 611 (21 S. E. 746); *Freem. Co-Ten.* § 262. In *Creat v. Jack*, 3 Watts. 238 (27 Am. Dec. 353), and note, it was held that "a joint tenant or tenant in common may not erect buildings or make improvements without the consent of his co-tenants, and then claim to hold until reimbursed a proportion of the moneys expended. Nor will it alter the case that the co-tenant knew that the buildings were being erected, and made no objection." The opinion there says: "There are, however, cases in which an owner standing by, and permitting another to expend money in improving, has, in equity, been deemed a delinquent, and been compelled to surrender his right on receiving compensation, or else to pay for the improvement; but in these cases there is always some ingredient which would make it a fraud in the owner of the land to insist on his legal right. There is something like encouragement to the other's going on; or the one party acts ignorantly, and without the means of better information, and the other remains silent when it is in his power to prevent him from expending his money under a delusion. To permit such a one to take advantage of the mistake would be revolting to every sentiment of justice. But, on the other hand, I know no case where equity has, on the mere ground of silence, relieved one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in expending money on the land of another without obtaining or asking his consent. His ignorance, if it exists, is willful, and he acts at his peril. In the case before us, there is no evidence that the plaintiff, in any respect, encouraged or connived at the erection of these buildings. Nor was the plaintiff bound to notify Blair of his right in the land, or of his dissent to the erection of the buildings. Blair was well acquainted with the title of the respective parties, and if he was not he was bound to inquire into the title before he undertook to appropriate the lot. It was a matter of record, accessible to all."

It is difficult to ignore the force of that argumentation in this case. In fact, if we turn to the case of *Foster v. Weaver*, 118 Pa. St. 42 (12 Atl. 313), and the principles stated in it, we could, with some plausibility, deny any

cost of production at all. That case held that one tenant in common, tortiously deprived by fraud of his co-tenant of his interest in an oil lease, is entitled, in a suit brought for his share of the oil produced and converted by the co-tenant, to recover as damages the value of the oil in the tank without deducting for expenses of production. The test there made as to such allowance is whether the party acted under honest mistake of good right, or otherwise; and seeing that our cases of *Hall v. Hall*, 30 W. Va. 779, (5 S. E. 260), and *Dawson v. Grow*, 29 W. Va. 333, (1 S. E. 564), upon the record of the case in which Jones purchased, and other circumstances, would affect him with notice and deny him improvements, I repeat that there would be plausibility for denying any cost of production. The thought occurred to me that the record charged Jones with only constructive notice, not actual notice, and perhaps actual notice was necessary; but *Hall v. Hall*, *Dawson v. Grow*, and *Cain v. Cox*, 29 W. Va. 258, (1 S. E. 298), and *Id.*, 23 W. Va. 613, reject this thought; also 10 Am. & Eng. Enc. Law, 247. *Effinger v. Hall*, 81 Va. 94, holds constructive notice tantamount to actual notice, but holds that purchasers at judicial sales may well presume everything rightly done, but that purchasers *in pais* must examine the chain of title. This exception as to judicial sales, I doubt, our case of *Hall v. Hall*, 30 W. Va. 779, (5 S. E. 260), is *contra*. The very record of the case in which the sale was made and Hickman's will spoke the rights of plaintiffs. If a man's deed tells him of another's right, why may we not say so when the record giving him title tells him of it? To say otherwise is to say a purchaser at a court sale may shut his eyes to the contents of the record, which would notify him of another's right, make improvements, and then take away that other's rights, though by the sale he derived no title to such other's rights; the suit thus operating to do indirectly what it does not do directly. If Jones, by mistake of law, was led to believe that the court sale conferred good title, that will not serve him. Opinion in *Hall v. Hall*, 30 W. Va. 785, (5 S. E. 260); *Harner v. Price*, 17 W. Va. 523; 10 Am. & Eng. Enc. Law, 248, note.

But there are other considerations. We are in a court

of equity, which often departs from dry legal rules in the interest of substantial, even-handed justice. It does not seem that there is any inflexible, iron-clad rule in equity in this matter, unless our statute imposes it. This is not the case of a suit to impose upon the co-owner a personal liability, or a liability on his land, for improvements, nor to continue in possession till future profits shall reimburse them; but it is a case where the plaintiffs ask an account to charge Jones with rents and profits, and he seeks to set off improvements. Yea, more, it is a case where the plaintiffs ask to receive the benefit of the property in its improved condition,—to have the benefit of those improvements; that is, they ask pay for oil flowing through these very wells, without which wells there would not be a gallon of oil for them or for Jones. The law is well settled that in account of rents and profits you must charge the party for the property in its condition before his improvements, and not with the profits of his improvements (page 789, 30 W. Va., and page 265, 5 S. E.); *Freem. Co-Ten.* § 282; *Code*, c. 91, § 2; *Moore v. Ligon*, 30 W. Va. 155, (3 S. E. 576); *White v. Stuart*, 76 Va. 566; *Early v. Friend*, 16 Grat. 21; *Fishack v. Ball*, 34 W. Va. 644, (12 S. E. 856). This is a strong factor in the solution of this question. The plaintiffs demand their oil, solely the fruit of the pluck and courage and energy of Jones, in hazardous enterprises, which might have involved him in ruin. They come into a court of equity, asking that we accord them their legal rights, and they are given unto them, but it is an adage that he who asks equity must himself do equity. He cannot, in every instance, eat the fruitage without sharing in the burden of the planting. I repeat that no immovable rule binds a court of equity in this matter. *Freeman's Co-Tenancy & Partition* (section 279) says: "Improvements made by one co-tenant, independent of any agreement so to do, may sometimes be proper matter to be considered in taking an account; but under what circumstances, and to what extent, improvements may be considered in taking an account between co-tenants, cannot be stated with desirable precision. It is probable, however, that they will not be made a subject of compensation, unless they are of a usual character and necessary for the ordinary and conceded use

of the property." There is a difference between the case where the party making improvements seeks, as an actor or plaintiff, to set up a debt against the co-owner or his land for improvements, and one where the co-owner calls on the other to account for rents and profits; for in the former case, generally, the party will fail, and in the latter, if the party has acted in good faith, he will be allowed to set off improvements. See opinion in *Effinger v. Hall*, 81 Va. 103; 3 Pom. Eq. Jur. § 1241. There is some authority that where one has in good faith put improvements on land he may, by a suit of his own, charge the land. *Bright v. Boyd*, 1 Story, 478 (Fed. Cas. No. 1,875). But unless there was an agreement or circumstances tantamount, or fraud, I would doubt this. Clearly, a consent to such improvement binds the party, and creates a lien on the land and a personal obligation. *Houston v. McCulney*, 8 W. Va. 135. (It is proper to remark that defendants claiming improvements under chapter 91, Code, may recover beyond rents and profits, if in good faith claimants). I repeat that this suit is to charge Jones with rents and profits, and it is not inconsistent to allow him as a set-off expenses of production, including, not merely handling the oil, but the cost of boring productive wells, under the particular circumstances of the case, namely, that by reason of the energy and risk of Jones he developed this hitherto worthless land into an oil field of almost amazing wealth, yielding far beyond the cost of development, and leaving to go to the plaintiffs large returns. If we give Jones his expenditures, still a large amount goes to the plaintiffs; otherwise Jones loses them, and this would violate a rule of equity which, translated from the Latin, says that "by the natural law it is not right that any one should grow rich by the detriment and injury of another." Much authority can be shown to support this doctrine in addition to that given above. Story, Eq. Jur. § 1236, note; *Corcoran v. Corcoran* (Ind. Sup.) 21 N. E. 468; *Stewart v. Stewart*, (Wis.) 63 N. W. 886; 11 Am. & Eng. Enc. Law, 1107. But for Jones' acts, this oil would not have been produced, so far as we can see; but for him perhaps this oil now enriching the plaintiffs would have been lost to them by being drained off by wells on adjoining lands. Under these circumstances, equity cannot be blind to the

argument that Jones' acts have been to the plaintiffs a blessing, not even in disguise, but plain and apparent. We can not be deaf to the argument that the labor, enterprise, and business ability of this man, though technically in the wrong, appeal to a court of equity with strong call for liberality so far as to repay him by set-off all outlay in producing oil, including cost of productive wells, and we resolve any doubt by so holding. A debt for such improvement could not be made against the plaintiffs, nor would we say that all their oil could be thus absorbed; but here is a large surplus.

In conclusion, I must not omit to say that our holding in allowing cost of wells is fortified by the precedent of *Ruffners v. Lewis' Ex'rs*, 7 Leigh 720, where parties, holding adversely to the plaintiff, were treated as tenants in common with them, and as they had bored wells, and discovered and produced salt water, were allowed improvements, including cost of wells, as set-offs against rents and profits, and even for abortive wells, the court saying: "The plaintiffs, if they will have advantage from their successes, must be content to share in their disappointments and failures. He who takes the profit must share the burden." True, in that case, the court found that the parties acted under fair belief of good title, so that their good faith could not be doubted. Here, under cases above cited, we cannot find that Jones is unaffected by notice of the plaintiffs' right; but for which I should not, for a moment, entertain any hesitancy in allowing him cost of wells. I have above treated the wells as if permanent improvements. Perhaps they are not to be so treated, but rather as a part of the cost of production, like a tank for keeping the oil when produced. An allowable improvement must be that which adds to—enhances the value of—the land permanently for general uses; but a well or derrick adds nothing permanently, at least for general use, and usable only for producing oil—the mere means or instrument of production. If this be so, there is less question about allowing their cost as but an item in the cost of production, though I have discussed the subject under the law relating to improvements. Treating cost of productive wells as cost of production of oil, we may say that, though Jones had notice of plaintiffs' right, yet he should be charged with net rents

and profits, not gross—with what he actually received,—otherwise equity inflicts a penalty. As an abortive well neither enhances the value, nor yields anything to the true owner, he ought not to be charged with its costs. I confess that, under our statute and decisions, I have hesitancy in this holding; but other members of the Court do not, and feeling that Jones, under the circumstances, has strong claims to such allowance, I concur with other members in so holding. But the law ought to be clearly and accurately understood in so important a matter, and I want to state for myself what I understand to be the law, under our statute and decisions. An ejected defendant, who made permanent improvements valuable to the estate, not when he merely believed his title good, but when there was reason to believe it good, may by filing his claims under section 32, chapter 90, and section 1, chapter 91, Code 1891, not only set off the value of such improvements against rents and profits, but recover any balance by which their value may exceed rents and profits; but if, when the improvements were made, there was not reason to believe the title good, he cannot even set them off against rents and profits; and notice either actual or constructive, of the defect of the improver's title and of the rights of others will preclude allowance for such improvements. He is precluded because he acts in bad faith or negligence, and cannot take away even the rents and profits of another by improvements the latter did not sanction, which by the common-law became part of the land and belonged to the true owner, no matter how they came there, and which the statute allowed only to one legally without blame. The wrongdoer is not given the benefit of his wrong.

Reversed and Remanded.

Special Term in August, 1897.

CHARLESTON.

48 595
46 520

McDONALD v. GUTHRIE, JUDGE, *et al.*

Submitted August 4, 1897—Decided August 4, 1897.

1. CONSTITUTIONAL LAW—*Commissioners of County Court—Removal of County Officers.*

Chapter 48, Acts 1897, allowing proceedings for removal of commissioners of the county court by proceedings in the circuit court, is constitutional. (p. 595.)

2. PROHIBITION—*Jurisdiction of Lower Court.*

Does prohibition lie merely because the jurisdiction of the lower court depends on the question whether a statute giving it jurisdiction is constitutional? *Per* BRANNON, JUDGE, it does not lie. (p. 598.)

Petition by J. S. McDonald against F. A. Guthrie, judge, and others, for a writ of prohibition.

Denied.

CHILTON, McCORKLE & CHILTON and S. C. BURDETTE, for petitioner.

FLOURNOY, PRICE & SMITH, MOLLOHAN & McCLINTIC, and BROWN, JACKSON & KNIGHT, for respondents.

BRANNON, JUDGE:

McDonald being a commissioner of the County Court of Kanawha County, a proceeding was instituted in the circuit court of that county by a number of its citizens to remove him from office, and he asked of this Court a writ of prohibition to restrain that court from going on with the case. The theory on which his case is here put is that chapter 48, Acts 1897, allowing a proceeding in the circuit court for his removal, is no law, because repugnant to section 4, Art. IX, of the State Constitution, which is as follows: "The president of the county courts, the justices of the peace, sheriffs, prosecuting attorneys, clerks of the

circuit and county courts, and all other county officers, shall be subject to indictment for malfeasance, misfeasance, or neglect of official duty, and upon conviction thereof their offices shall become vacant." McDonald's counsel would maintain that he must first be indicted for the wrongs imputed to him, and for which his removal is sought by mere petition in the circuit court, and not until conviction can he be removed. If this is so, what office does section 6, Art. IV, of the Constitution perform? It provides that "all officers elected or appointed under this constitution may, unless in cases herein otherwise provided for, be removed from office for official misconduct, incompetence, neglect of duty, or gross immorality, in such manner as may be prescribed by general laws." It is very broad,—“all officers elected or appointed under this constitution.” But counsel say there is a limitation of its scope in the words, “unless in cases herein otherwise provided for,” and they further say that section 4, Art. IX, does otherwise provide as to county officers in saying they are subject to indictment, and, if convicted, their offices shall be vacant. If this is so, then section 6, Art. IV, has no application to any county officer at all, because section 4, Art. IX, covers all county officers, and plainly makes mere conviction *ipso facto* operate a removal, without any other proceeding, and hence there is no call as to them for the proceeding for removal under the legislation authorized by section 6, Art. IV. It would have no reference to any county officer, though its broad language applies it to “all officers elected or appointed under this constitution.” I have no doubt that if, upon indictments for the offenses specified in section 4, Art. IX, the party be convicted, the judgment would itself work his removal from office, without any other process to reinvestigate the facts: for, those facts having been once proven before a jury beyond reasonable doubt,—the highest test which the accused could demand,—why reinvestigate in another proceeding? If the party happens to be so convicted, that alone devests him of office as an unfit incumbent. He may refuse to yield, and proceedings for actual amotion become necessary; but that would be a proceeding by *mandamus* or *quo warranto*, wherein the record of conviction would be the only evidence required to dispossess him of actual pos-

session, and it would not be a proceeding to investigate the original charge. The words "become vacant" show this. But indictment for the offenses specified is not the only mode of removal. There may be no indictment, and yet the party may be guilty of those offenses; and there ought to be some process accessible to the county court or citizen having for its direct object such removal, and section 6, Art. IV., says that it shall be as provided by general law, and such is the act of 1897. If the construction that, before removal, a county officer must be indicted and convicted, be correct, what would be done with one guilty of gross immorality? Section 4, Art. IX, contemplates indictment only for malfeasance, misfeasance, or neglect of official duty, and gross immorality would not be included in those terms, and there could be no removal for it, though section 6, Art. IV, says it is a ground of removal. Under the construction contended for there would be no use for section 6, Art. IV, except as to constables and road surveyors. Then, what do the words "unless in cases herein otherwise provided for," in section 6, Art. IV, mean? I answer they do not at all refer to section 4, Art. IX, except as to persons convicted, but to other provisions of the Constitution, providing other and specific processes of removal. For instance, the provision in section 17, Art. VIII, that judges may be removed when, from age, disease, mental or bodily infirmity, or intemperance, incapable of discharging their duties, is an exception. Section 9, Art. 4, is an exception, as it provides for impeachment and removal of state officers by impeachment by the house of delegates and trial by the senate. This is the only mode for their removal. This would include all judges, as they are state officers, though they may be removed for causes not mentioned in section 9, Art. IV, but mentioned in section 17, Art. VIII, by the legislature. These are special provisions as to the cause and process of removal of particular officers, rendering prudent the said exception to the wide language of section 6, Art. IV. So the case of conviction of malfeasance, misfeasance, or neglect of duty under section 6, Art. IX, would be an exception, because it itself declares the removal, dispensing with any steps to remove under legislation contemplated by section 6, Art. IV. It was not designed to declare as

an exception that all officers must be indicted and convicted to effect their removal. It would be a strange thing that the Constitution would give the legislature power to provide a process or mode of removal for all officers under it for certain causes, and turn right around, and itself provide that process by indictment, rendering the power given the legislature nugatory. It would render section 6, Art. IV, practically useless. We must read both sections together, and give each an office, and not let one devour the other. Section 6, Art. IV, means that, except in instances otherwise provided for, all officers, no matter as to grade or character, may be removed, for causes it mentions, in such mode as the legislature shall provide by general law. Section 4, Art. IX, has for its object to declare that all county officers shall be indictable for malfeasance, misfeasance, or neglect of official duty, and enjoins upon the legislature to so provide, and fix the punishment. That is its main purpose, as the subject of removal is elsewhere provided for. But it adds itself, in case of conviction, the additional penalty of loss of office as a legal consequence of judgment of guilty on the indictment. Section 9, Art. IV, carefully provides for an indictment of state officers. Each section answers a separate purpose. The intent that county officers shall be removed as the legislature may provide is still further manifested by sections 26, 27, Art. VIII, saying that clerks of county courts and justices shall be removed as shall be prescribed by law, in harmony with section 6, Art. IV. It cannot be claimed, in view of this special provision as to them, that they must be indicted. Why not they as well as other officers?

The case raises the question whether prohibition lies. I think it does not. Writ of error would lie to final judgment. It makes no difference that the jurisdiction of the circuit court rests on whether the act is constitutional, for that court has to pass on the constitutionality of the act, because it involves its own jurisdiction, just as it has to pass on any other law question in the case. (*County Court v. Boreman*, 34 W. Va. 362 (12 S. E. 490)). I speak on this point for myself only, other members of the Court thinking it unnecessary to decide the question. The Court, regarding said act of 1897 as constitutional, re-

fuses the writ of prohibition. Section 8, Art. IV, has another office. The Constitution elsewhere provides for removal of all officers named by it; but this provides as to officers not named by it, but created by law, giving the legislature power to regulate their removal; thus covering, all the sections taken together, the whole subject of removal.

Denied.

September Term, 1897.

CHARLES TOWN.

EASTHAM v. HOLT, JUDGE.

(McWHORTER, JUDGE, *concurring.*)

(ENGLISH, PRESIDENT, and DENT, JUDGE, *dissenting.*)

Submitted September 3, 1897—Decided September 14, 1897.

1. PROHIBITION—*Abuse of Power—Jurisdiction of Court.*

Prohibition. When it lies for abuse of power when court has jurisdiction. (p. 601.)

2. GRAND JURY—*Discharge of Grand Jury—New Grand Jury List.*

Grand Jury. When it may be discharged. Does its improper discharge impair indictment by a subsequent jury? How many can there be at regular or adjourned term? When court may order new grand jury list. (p. 602.)

3. GRAND JURY—*Talesmen—Statutes—Common-Law.*

Grand Jury. Organization of. Can circuit court test the qualifications of those on the list? Does formation or expression of opinion disqualify? Excusing them. Talesmen. Must they come from the county court list exclusively? Does the statute as to selection and summoning grand jurors exclude wholly the common-law method and powers of the court? Does excusing a competent grand juror impair indictment if his place is filled by a competent one? (p. 605.)

43	599
43	638
43	599
150	53
150	78

4. GRAND JURY—*Challenge to the Array—Evidence.*

Grand Jury. Is there a right to a challenge to the array or polls, or must objection be by plea in abatement? Can accused ask a particular charge, or except to the charge? Has his counsel the right to discuss questions as to competency or organization? Has defendant the right to send witnesses to grand jury? Can grand jury hear evidence other than that of state? (p. 617.)

5. GRAND JURY—*Indictment—Murder—Manslaughter.*

Grand Jury. Is a charge that where a homicide is proven, and no circumstances of excuse appear, it is proper that the indictment should be for murder, erroneous, in not saying that the jury have power to find an indictment for manslaughter? Does it affect an indictment for murder? (p. 615.)

6. INDICTMENT—*Bias of Judge.*

Does bias of the judge impair an indictment? (p. 615.)

7. DISCHARGE OF ACCUSED—*Nolle Prosequi.*

Discharge of Accused. When he is entitled to, if not indicted, or on *nolle prosequi*. (p. 617)

8. JUDGE—*Abuse of Power.*

Will keeping a grand jury in custody of sheriff, or refusing to bail, or refusing to sign exceptions as to formation of grand jury, show such abuse of power by judge as to impair indictment? (p. 612.)

9. CONSTITUTIONAL LAW—*Prohibition.*

Is the statute giving power to a single judge of Supreme Court to award a rule in prohibition constitutional? (p. 620.)

Petition of one Eastham for a writ of prohibition directed to one Holt, judge of the Circuit Court. Writ denied by operation of law, because of a divided Court.

Denied.

C. W. DAILEY, F. M. REYNOLDS, MARSHALL McCORMICK, C. O. STRIEBY, J. T. MCGRAW, W. B. MAXWELL, H. G. MOFFETT, and F. C. REYNOLDS, for petitioner.

A. G. DAYTON, J. J. DAVIS, JOHN A. HOWARD, WM. C. CLAYTON, A. M. CUNNINGHAM, A. B. PARSONS, and WM. G. CONLEY, for respondent.

BRANNON, JUDGE:

Eastham was indicted in the Circuit Court of Tucker County for the murder of Thompson, and he obtained from a judge of this Court a rule against the judge of the cir-

cuit court of that county to show cause why a writ of prohibition should not be awarded to him to prohibit the circuit court from further proceeding upon said indictment. The State of West Virginia moves to discharge that rule as improvidently awarded, and thus we have the question whether prohibition lies in this matter. This Court has repeatedly laid down, in harmony with the law elsewhere, that the writ of prohibition lies only where the inferior court is entertaining a cause where it has no jurisdiction, or where, having jurisdiction, it abuses that lawful jurisdiction, and there is no other adequate remedy, and that it does not lie where other processes answer the demands of justice according to the usual legal procedure. Observe that, to warrant prohibition, two things must concur: (1) That the court has no jurisdiction, or is abusing its lawful jurisdiction; and (2) that there is no other remedy to correct its error. Code 1891, c. 110, s. 1; *County Court v. Boreman*, 34 W. Va. 362 (12 S. E. 490), and citations. No one can or does question that the Circuit Court of Tucker has jurisdiction to impanel a grand jury to inquire of and prefer an indictment for murder, and to try the case upon such indictment, or that it had jurisdiction in this particular instance; but the claim of Eastham's counsel is that, though that court had lawful jurisdiction of the subject-matter, yet that in the action of the court in the formation of the grand jury, and the bias and prejudice of the judge manifested in dealing with the grand juries while considering the case, and in other respects, the court abused and exceeded its lawful power, rendering the very indictment itself no indictment in law,—a mere nullity. Let us see whether the circumstances do make this indictment a mere blank in law; for, if it is not such, a prohibition can not be allowed.

A grand jury indicted Eastham for involuntary manslaughter,—a misdemeanor; and the prosecuting attorney, thinking that he should be tried for a higher grade of offense, dismissed this indictment by *nolle prosequi*. The court then made an order directing the county court to meet, and make up a list of persons from which grand jurors were to be drawn, and adjourned until an adjourned term, when a grand jury was impaneled, and reported that they could not agree to find "A true bill," or "Not a true

bill," and were adjourned until the next morning; and, as the judge's answer to the rule says, after the adjournment the prosecuting attorney called on the judge, and stated that the foreman had requested him to say to the judge that it was useless to hold the grand jury longer, as it was hopelessly divided, and would not be able to reach a finding of any kind. The record says that they reported they could not agree in a finding. Eastham represents that the grand jury said that they had not as yet agreed as to his case. No other business remained for the grand jury. Taking the judge's answer and the record as true, the discharge of the grand jury was not improper. It is within the discretion of a court to discharge a grand jury. It is a common-law power. Our code recognizes this power in saying that "when one grand jury has been discharged another may, by order of the court, be summoned to attend the same term." Code 1891 s. 10, c. 157. And section 9 says that, when one grand jury has found an indictment not a true bill, another indictment may be sent to it, or acted on by another grand jury, showing that the State may have another grand jury, and persist in her prosecution. Of course, it can do so where there is no finding at all, as here. It is not possible to say that we must minutely inquire whether this discharge was wise, and, if not wise, that it shall vitiate an indictment found by a subsequent grand jury. The defendant cannot take advantage of it, as its discharge released him from peril from that grand jury, unless we assume that it would have found for a low grade of offense, or none, and then say he had a vested right to have his case passed on finally by that grand jury. We cannot say this. And, if it had returned "Not a true bill," it would be no bar to a second indictment. How can it affect a later indictment? That stands on its own feet, and the discharge of the former grand jury is irrelevant in considering the indictment by a subsequent one; the question then being, is the work of the later grand jury a valid indictment? The court ordered the clerks of the county and circuit courts, on the motion of the State, as authorized by chapter 157, section 1, to draw another grand jury, and on a subsequent day of the term it assembled and found an indictment for murder. *Burton's Case*, 4 Leigh, 647, states the common-law to be that

another grand jury may be ordered upon two occasions. (1) If before the close of the session the grand jury have brought in all their bills and are discharged, and a new offense is committed, or an offender is brought in. (2) "The second ordinary instance of a new grand jury returned is upon the statute 3 Hen. VII. c. 1, namely, a grand inquest to inquire into concealment of another grand inquest, *etc.* 2 Hale, P. C. 154, 156." So says Chit. Cr. Law, 314; Thomp. & M. Jur. § 497. Likely it was thought by the judge that under the principle here stated he was warranted in calling another jury. There was found in the grand jury room, and shown him, a memorandum signed by the clerk of the second jury, reading as follows: "We, the grand jury, find from the evidence before us as follows: That R. W. Eastham made numerous threats against F. E. Thompson. We find that R. W. Eastham assaulted Thompson in the car; one wit. testifying that, to the best of his knowledge and belief, that Eastham fired the 2 first shots. We find that F. E. Thompson died from wounds received in the above encounter." As his reason for ordering a new list of grand jurors to be made up, the judge states that he learned reliably that the county clerk, whose duty it was to draw the grand jury, was openly and avowedly in sympathy with the accused, and that the names in the box from which grand juries were to be drawn, and from which the last one had been drawn, were on slips of paper not folded so as to conceal the names, but open, so that the clerk, if he desired, could select particular ones, and that he (the judge) was reliably informed and believed that such clerk would, if possible, draw an unfair and partial grand jury, and that, as he thought it to be his duty and power, he opened the box in the presence of the prosecuting attorney and clerk of the circuit court, and found said slips of paper unfolded and the names unconcealed, so that any one drawing names could make choice, and therefore he ordered a new list. Section 2, chapter 157, allows the court to open this box, and section 1 allows the court to order a new list. A large discretion is here given the court for the administration of justice. Surely for its mere exercise we cannot review it.

We must now inquire as to the third grand jury, for

here is the kernel of the case. I view all antecedent circumstances as immaterial, as this grand jury and its indictment must stand or fall on their own strength or weakness. These antecedent circumstances as to the two former grand juries may be used as circumstances to sustain the grave charge made against the judge of bias against the accused, to which I will below refer. We have seen that when one grand jury is discharged another may be summoned for the same term. But it is said this was the third at the same term, and that not more than two can sit at the same term. Why not? This ought not to be the law, if it is; for there may occur grave offenses during a long term, and the public and the accused have the right to a speedy trial. It is clear that a criminal court possesses at common law, without statute, inherent power to impanel grand juries, and I know no limit; but I know, on above authority, that it can summon new grand juries at the same term, and this inherent power carries the ability to summon new ones as often as necessity exists. Opinion in *Burton's Case*, 4 Leigh. 648; *Shinn's Case*, 32 Grat. 899. But counsel say that when the Code says that, when one grand jury is discharged, "another" may be summoned for the same term, it means only one other,—a very strict construction, depriving a court of a power given by common law for wise purposes in the speedy administration of justice. It means no such unreasonable thing. It only means to declare, out of great caution, what the common law gave,—a power to have further grand juries. Why so narrowly construe a remedial clause? If it had been intended to change the common-law power, and limit to one grand jury, why did not the lawmaker, if he had in his head that purpose, say so? Mere implication cannot so crop the powers of a court. And just now I notice, what is strongly confirmatory of this view, that Code, c. 157, s. 1, provides that "any circuit court may, at a special or adjourned term thereof, whenever it shall be proper to do so, order a grand jury to be drawn and summoned to attend such term." Who is to judge when it is proper to do so,—the judge or prosecuting attorney, or an accused? I say the public functionaries, as grand juries are to subserve public ends. And it may well be that more than two juries are needed

at a regular or adjourned term. This shows, in connection with section 10, saying that when one jury is discharged another may be summoned, a clear intent to have a second jury, or more, either at the regular or adjourned term (that is, two at the adjourned term), and not to count the one at the regular term, and thus disable the court from having two or more at the adjourned or regular term. So it is clear that no law forbids three grand juries at one term.

It is alleged that the list of grand jurors is not mentioned in the record of the county court. There is no denial that the list was in fact made by the county court. It is found in the possession of the lawful custodian, the clerk, as well as ballots made from it. This duty of a county court is merely ministerial, not judicial.

Another objection is that the court illegally excluded certain grand jurors. The court asked the jurors whether they knew the circumstances of the case, or had formed or expressed an opinion about it. The broad position is taken that, when the county court makes its list of persons for grand jury service, it finally settles their qualifications, and the court cannot inquire into their qualifications, to see if they are freeholders, or otherwise qualified, because section 3, chapter 157, Code, says that all grand jurors shall be selected from the list by drawing ballots, and those drawn must serve, qualified or not. If so, one not a freeholder when placed on the list, or becoming such later, must be seated, in the teeth of the act disqualifying him. If he is then deaf or insane, or afterwards becomes so, he must serve, under this doctrine. The law says that the county court shall select freeholders who are "in other respects qualified," and not constables, hotel keepers, surveyors of roads, or owners or occupiers of mills. It can not have been meant that the court, which has the duty of impaneling, is powerless to carry out this legislative intention by inquiring into qualifications. The Michigan act says those drawn "shall be the jury to try the cause" (Comp. Laws 1857, § 4392),—as strong language as our act; yet, held, the court may select others. *Mining Co. v. Johnston*, 23 Mich. 37. The old law was that the sheriff should return a list. Did anybody then imagine that the court could not go behind his decision and test their

competency? They always did so. The only difference is that now the county court makes the list, performing a merely ministerial act, not judicial; and this list does not conclusively establish the qualifications of those on it, but merely presents names for lawful selection from them by the court impaneling the jury, according to its functions at the common law. In both cases the lists are only lists. The court can test qualifications. The court in this case put to the jurors fair and impartial questions, as to whether they had heard the facts, or had formed or expressed an opinion as to the case, and excused five, and put others in their places. I do not think this was proper, because our statute allows the unsworn statement of two grand jurors to call for an indictment, and this shows that a bystander fully conversant with facts may be a grand juror. And I do not think the formation or expression of an opinion as to the case calls for exclusion, though Chief Justice Marshall, in the great trial of Aaron Burr, (Fed. Cas. No. 14,692g) for treason, allowed this objection, and other very respectable authorities have allowed it. 3 Rob. Prac. 89. It is fair to say that much authority can be found giving a court, even in felony trials, power to discharge jurors. Thomp. & M. Jur. §§ 258, 259. There it is laid down that, as the selection is for the court to secure fit persons, large discretion is given, and that "it by no means follows that, because certain causes have been declared sufficient to justify the trial court in excusing a juror, the sufficiency of excuses in general must be considered a matter of law. On the contrary, it may be considered as the recognized rule that the discharge of a juror under these circumstances is a matter addressed to the sound discretion of the court, which will not be reviewed in the absence of evidence showing prejudice to the complaining party from the abuse of such discretion." 5 Am. & Eng. Enc. Law, 5. And in section 580, subsec. 1, Thomp. & M. Jur., this doctrine is applied to grand juries. The great law writer, Bishop, says perhaps a greater number of courts have upheld this ground of exclusion, and he only doubts it because of the difficulty of enforcing it where so many cases come before a jury, rather sanctioning the principle of excluding for formed opinions, and treating it as an open question. 1 Bish. Cr. Proc. § 881. But it is treated in argu-

ment in this case as utterly unheard of, and as violating the right of the accused and unprecedented. Complaint is made as if the jury were not fair, and yet an examination calculated to get an unbiased jury, free from formed opinion, is relied upon to overthrow its work. How could those questions hurt the State or the accused? But I do not think it proper to exclude for this cause, as there can be no challenge of grand jurors for favor, though there may be for cause, as not a freeholder. Mere favor will not do. *Thomp. & M. Jur.* § 574; *State v. Hamlin*, 36 Am. Rep. 54; note, *Com. v. Green*, (Pa. Sup.) 12 Am. St. Rep. 906 (s. c. 17 Atl. 878); *State v. Davis*, 34 Am. Rep. 706; *Com. v. Woodward* (Mass.) 34 Am. St. Rep. 302, and note (s. c. 32 N. E. 989). Challenge for favor does not prevail in Virginia. 3 Rob. Prac. 92.

The judge, in his sworn return to the rule, says he had learned that grand jurors had been approached and tampered with by friends of the accused, and he deemed it his duty to put these questions, in the effort to get an impartial grand jury, and thought it proper, under the circumstances. The statute says they shall be freeholders, and "in other respects" qualified; and the court may have thought this course proper, under this language, and no doubt acted in this in good faith. But he enforced a qualification not a qualification. Then what is its effect? Does it nullify the indictment? I think not. There is no claim that those substituted were disqualified. This Court held that if qualified jurors were rejected, and qualified jurors substituted, this would not vitiate a verdict, because, so the case is tried by a fair, qualified jury, that is all the party can ask. I refer to the discussion of this subject in *Thompson v. Douglass*, 35 W. Va. 337, 340 (13 S. E. 1015). I now find the position there taken sustained by authorities not there given. *Thomp. & M. Jur.* § 251, says: "Where a statute simply provides that an exception may be taken for disallowing a challenge, no exception lies for allowing a challenge,"—and says: "The reason is that when a competent jury, composed of the requisite number of persons, has been impaneled the purpose [of the law is accomplished. Neither party can be said to have a vested interest in any juror. Therefore, though one competent person has been rejected, yet, if another equally competent has been

substituted in his stead, no injury has been done." See *Id.* § 259. Judge Christiancy affirmed this doctrine in *Mining Co. v. Johnston*, 23 Mich. 37. See (strong instance) *Com. v. Livermore*, 4 Gray, 18, where a juror in a criminal case was excused, though qualified, and it was held no error. Judge Hughes, in the United States Circuit Court of Virginia, thought it better to excuse such juror, and held that where a foreman is relieved, and another substituted, it did not affect the indictment. *U. S. v. Belvin*, 46 Fed. 381. See (strong case) *State v. Hunter*, 43 La. Ann 157 (8 South 624). *State v. Schieler* (Idaho) 37 Pac. 272, holds it right to excuse a grand juror informed of facts. I refer specially to a case just met with, and the opinion, holding that a grand juror may be excused by the court on its own motion, if the one substituted be qualified. See the opinion in *U. S. v. Jones*, 69 Fed. 973. Yet here, in the case of a mere grand jury, this is claimed to nullify its work. For stronger reason this rule applies to a grand jury, as said in the Vermont case of *State v. Ward*, 14 Atl. 187, 194, where it is said that the accused had no vested right to a particular grand juror, and the right to excuse, exercised for good purposes to promote justice, was properly exercised. See that opinion. It is a mere irregularity, or rather error of judgment, in the judge, but the grand jury is none the less one assembled under color of law, by a competent court, and not a body of usurpers, wholly unauthorized. *Thomp. & M. Jur.* § 140, says: "The grand jury is merely an accusing body, and the liberty of the citizen does not require that nice inquiry should be made into the manner in which it has been organized. The main question is whether the prisoner has been justly accused or not. * * * Such attacks have been successful in American courts with scandalous frequency, and almost universally to the thwarting of public justice and the injury of society. But with reference to the constitution of the body to try the prisoner the question is entirely different." *Thompson & Merriam* say in section 554: "In view of the fact that the finding of a grand jury is only an accusation, at most, it is not surprising that courts should not be astute in discovering technical irregularities in the process of procuring this jury [grand jury],"—and quotes Justice Swayne as saying in *U. S. v. Ambrose*, 3 Fed. 287: "Whatever

occurs in regard to the constitution of a grand jury is really a matter of very little importance to the defendant. It is fairly to be supposed that if one grand jury, made up in good faith, has found an indictment, another, on the same testimony, would find another. So that the only benefit to the defendant, even if that be a beneficial result, would be delay before the trial." Same effect, 9 Am. & Eng. Enc. Law, 3, note. Having said that this mere error of judgment of the judge does not make the grand jury a body of usurpers, void and of no authority, I refer to the dissenting opinions of Judges Beatty and De Haven in the California case of *Bruner v. Superior Court*, 28 Pac. 351, 352, and the case of *People v. Petrea*, 92 N. Y. 128, where an indictment by a grand jury drawn from a petit jury list under an unconstitutional statute was held valid, and the party tried under it, and it was held no infraction of the right given by the constitution to be first indicted by a grand jury. The court said: "The grand jury, though not selected in pursuance of a valid law, were selected under color of law and semblance of legal authority. The defendant in fact enjoyed all the protection which he would have had if the jurors had been selected and drawn pursuant to the General Statutes. Nothing could be more unsubstantiated than the alleged right asserted by the defendant under the circumstances of this case. * * * An indictment was found by a body drawn, summoned, and sworn as a grand jury, before a competent court, and composed of good and lawful men. This fulfilled the constitutional guaranty. The jury was a *de facto* jury, selected and organized under the forms of law." "Moreover," said the judge, "they were good and lawful men, duly qualified to sit as grand jurors." Mere irregularity in the manner of selecting the grand jury, when objection does not go to the competency of jurors, can not be taken advantage of even on plea in abatement. 1 Whart. Cr. Law, § 472, note, and *State v. Ward* (Vt.) 14 Atl. 192.

After the exclusion of five of those summoned, it became necessary to supply them, as the law requires only sixteen to attend a term. It is argued that they must be from the list prepared by the county court. This would require the clerk of the circuit court to summon the clerk of the county court to meet him and make a new list, and they

would have to be summoned by *venire facias*, and the statute provides for this formulary to be done twenty days before a term, at least. Plainly, the statute does not provide for all this in case the sixteen attending are cut down below the lawful jury of fifteen. Is the court powerless to complete the panel? The common-law, in cases wherein the statute does not provide, would say to the court to go on by directing the sheriff to summon talesmen forthwith. The dispatch of business requires it. *Com. v. Green* (Pa. Sup.) 17 Atl. 978. The very power to impanel a jury carries with it this power. *Thomp. & M. Jur.* 581; *Burton's Case*, 4 Leigh 645. If there be no common-law power to summon talesmen (I think there is), it is all the more necessary to give this remedial construction to our statute. The argument is that section 3 of chapter 157 says all grand jurors shall be taken from such list, and that not even the language of section 10, that "if the foreman or any grand juror be unable or fail to attend after being sworn, another may be sworn in his stead," will let the court fill his place except from the county court list. The act does not say so. How inconvenient! The common-law power cannot be taken away by such mere implication. The idea that a court can be thus disarmed of its wonted and necessary powers cannot be sustained. This section does but declare the old inherent common-law power of the court. Again, it is argued that section 10, when it says: "If a sufficient number do not attend, the court shall direct the sheriff to forthwith summon as many others as may be necessary, whether their names are in such list or not, but who shall in other respects be qualified to act as grand jurors,"—not only does not declare the right of the court to summon talesmen to fill the places of those who attend but are rejected, but impliedly prohibits it, as it allows such summoning only to fill vacancies caused by nonattendance. Rigid construction,—very rigid,—paralyzing, almost, the court from going on with its business. I say that that language, fairly construed, plainly intended to provide against failure to complete, for any cause, a jury from those attending, and only declares the common-law, inherent power of the court, possessed by it because it is a criminal court empowered to inquire by its grand jury and try public offenses, to complete its grand jury once begun.

Why say it applies only in one event, nonattendance, when from many causes the sixteen will prove inadequate? The word "forthwith" negatives any idea that you must go through the routine of issuing a new *venire facias*, summoning clerk, and drawing ballots. The statute declares that it makes no difference whether those summoned are on the county court's list or not, overriding the contention that talesmen can only come from it, if it applies to other cases than failure to attend. In 9 Am. & Eng. Enc. Law, 4, we read: "Where a statute provides the manner in which grand jurors shall be selected and drawn, it does not necessarily exclude the common-law method; and, if an exigency arises, a court may direct an open venire for the selection and summoning of a new panel."

Next it is objected that these talesmen were summoned by one not authorized. The sheriff had the court appoint Haller and Lipscomp as special deputies "for the sole purpose of serving the summons on the special grand jury this day drawn"; and it is contended that their authority extended only to those on the list, not to summoning talesmen. This is drawing a very refined point. Those talesmen were a part of that grand jury. If fit to summon those on the list, why not the talesmen? Their power fairly extended to them. I am not sure that a deputy once made is so limited in authority, our statute giving him like power with his principal. It is claimed that his powers had closed, because the sheriff, before he summoned talesmen, told Haller he had no further use for his services. There was no formal act of removal. But is it possible this can destroy totally the legality of the grand jury, and make its work void? To say so would be a travesty on justice, sticking in the bark and forgetting the heart of the tree, making solemn legal proceedings perish for mere technicality. Not a word is said against the jurors this deputy summoned. The court swore them in as grand jurors,—a competent court. They did not leaven the mass, and make the jury a usurpative body. Our statute gives no challenge for such cause,—indeed, for any cause; and Thomp. & M. Jur. § 557, says, as to the objection that a substitute for a sheriff summoned grand jurors, that "statutory challenges to the panel are generally regarded as exclusive of all others, and therefore, if the

statutes do not afford means of enforcing the right here conceded, by a challenge to panel, this can be done in no other way. And at common-law there seems to be no right to challenge the grand jury panel or jurors." *Thomp. & M. Jur.* § 507. Section 555 says: "It is not a sufficient ground for a challenge to the array that a jury list was prepared by *de facto* commissioners only." Much less so where a few talesmen are summoned by an agent of the court, almost, if not wholly, in its sight. With great emphasis the counsel of the accused cite the case of *Bruner v. Superior Court*, 28 Pac. 341, holding, under a California statute providing that where sufficient grand jurors are not present the court shall order the sheriff or an elisor to summon others, that grand jurors summoned by an elisor without its appearing that the sheriff was disqualified, were illegal, and made the grand jury and its indictment void, and justified a writ of prohibition because the indictment was void. This decision is illogical in itself, and loses force when we see that, out of seven judges, three entered dissent in very strong opinions, asserting that, though the elisor had no authority, yet the grand jury was not a void body, but assembled under color of law in a regular court, and was recognized as such. And there is no objection to their qualifications, only to the manner of summoning.

It is objected further against this indictment that the grand jury, at a recess for a meal, was put in charge of the sheriff, as if a petit jury, and this is charged to be contrary to law. It is unusual, but is it contrary to law? If a court thinks its grand jury may be exposed to undue influences, I would suppose it might take this precaution. How could it hurt the accused, in a legal point of view? A grand jury must go only on evidence, and no one has a vested right to have it exposed to danger of improper influences, if the judge thinks there is danger of it. He is the public functionary having supervision of it.

It is objected that the counsel for accused asked to see the indictment, but was refused. It was late at night, and the court was to adjourn; and the judge says he thought prudent to take care of the paper, and, instead of allowing the original indictment to go into the hands of the attorneys, at once ordered the clerk to furnish a copy within an

hour, and it was furnished. This was a reasonable provision. The Code (chapter 159, section 1) does not give an accused or his counsel the original indictment, but a copy. I fail to see the effect of this to invalidate the indictment.

Another point made by the accused is that the record of proceedings in the case as made in the order book is false, as regards the report made on the case by the second grand jury, and in stating that the talesmen were summoned by the sheriff, whereas they were summoned by Haller, under circumstances above given, and that the judge refused to correct the record. It is clear that we must follow the court record as made by the constituted authority. The judge, however, admits in his answer that Haller summoned the talesmen; and I have treated that as a fact, and considered the question, though, perhaps, as contradicting the record, it might be disregarded, as inadmissible.

Another point is that the judge refused to sign bills of exception setting out the challenge to the array, the exclusion of persons from the grand jury, the facts touching Haller's acting as deputy sheriff, and exception to charges given the grand jury. Bills were prepared, placed in the judge's hands to consider and before coming into court afterwards he was served with the rule in this case, and announced that for that reason he would not sign them, as it would be in contempt of this Court, and would not alter said order book for a similar reason. I am clear in my own mind that the rule did not prohibit the circuit court from manifesting by its order book and bills of exception its past action, but only further steps of prosecution, and yet I cannot say that one might not think, with some plausibility, that it stopped at once all proceedings whatever. Would it be an abuse of power to think so? But prohibition does not lie for this. A *mandamus* to compel the signing is the proper remedy. The judge says he is willing and ready to sign when the prohibition ends, thus showing that he does not propose to abuse his power in this matter, so that prohibition, if it would lie, is not necessary on this score. He did sign a bill as to ordering a new grand jury.

It is urged that the court charged the grand juries erroneously. I shall not at this point refer to a charge to the

second grand jury, as it is immaterial under this head. The accused asked the court to say to the grand jury which found the indictment that it had the right to call for any witnesses, if its members believed they could give testimony bearing on the case. The grand jury is a one-sided proceeding, and before it the accused has no right to appear or to send witnesses. It is only a means adopted by the state for inquiring whether its criminal law has been violated, and to present its accusations for jury trial. By no means does it hear the whole case. It is only the state bringing a prosecution. The state presents to it its indictment, and the grand jury has only to say whether, upon the state's showing, the accusation is well made, or proper to be tried by a jury. It is true the jury is sworn to present the truth, the whole truth, and nothing but the truth; but the connection of that clause with its neighbor words in the oath shows that it is to prohibit them from the influence of malice, hatred, ill will, fear, favor, partiality, or affection; and it certainly means no more than that they shall present the whole truth, and nothing but the truth, as shown by the evidence presented by the state. They find on it. They do not go into a search for evidence to exculpate the defendant. Once lay down the rule otherwise, and the defendant, by some friend on the jury, will call up controversy, and virtually try both sides in the grand jury room, where the state can not be present by her attorney to sustain her charge by a full presentation of the law, and an inadequate investigation into her charge will take place, and prosecution for the gravest crime will be smothered and crime fostered. I know that it will be said the defendant may under this rule be the victim of false or mistaken prosecution. True, but that is inevitable in instances. If the oaths and other safeguards of the grand jury do not furnish adequate security against that misfortune, I can only say the wit of man has yet devised no better. His vindication comes before the petit jury. I know that some authority to the contrary can be shown, but I answer that the vast volume of ancient and modern authority sustains this view. This has been recognized in some states, as in New York, by statutes allowing the grand jury to send for witnesses, showing that it required legislation to admit such evidence.

Fault is found in the charge of the judge to the grand jury, in that there would be evidence before it of the killing of a citizen of Tucker County, and "should the evidence be sufficient to make a *prima facie* case of willful, deliberate, and premeditated killing (what I mean by that is, should it be sufficient of itself to show such killing, without explanation by the accused), then you should find an indictment for murder," and stated that upon such indictment on trial the defendant could plead any legal defense. I see no error in this,—nothing that is not warranted by the usual practice. Is the complaint that this constructively tells the jury that all homicide is *prima facie* murder, and ought to be so indicted? This is true. It is the usual and proper course, and one advised by the courts in their charges, that it is proper in such case to find an indictment for murder, so that the state and accused can get their respective rights in a high or low grade of crime, according to the evidence. The judge did not tell this jury it could find an indictment for manslaughter, as clearly it could, under chapter 144, Code. But who will say it is error to omit it from a charge? But what if a judge does err in a charge to a grand jury? The defendant can take no exception to affect the indictment. He can not ask any particular charge. *Thomp. & M. Jur.* § 600. When once the indictment has been returned "A true bill," it is immaterial whether the court erred in charging or omitting to charge, as the question then is to try the case, and learn whether the accused is guilty. Failure to charge, though statute requires it, will not affect indictment. *Porterfield v. Com.* (Va. ; 1895) 22 S. E. 352.

I come now to the charge of prejudice and bias on the part of the judge against the accused. This charge can not be made upon even a final trial before a jury. Were this tolerated, any one under charge of crime could shear courts of their powers, drive judges from the bench, and greatly impede the administration of justice. *Whart. Crim. Pl. & Proc.* § 605; *People v. Williams*, 24 Cal. 31. Prejudice in the breast of a judge, a lawgiver in Israel, is odious under sacred and profane law, is easily and readily imputed by persons in the heat of controversy, and, under the sting of adverse decisions, is difficult to clearly disprove, and should never be found except upon the most cogent

proof. From the many circumstances in this great and important case, on which is predicated this grave charge, I am unable to verify it. If there is other explanation, we must give it. I do not think circumstances above given will sustain it. Nor do I find others. It is true that when the second grand jury failed to find anything the judge did use language to it which, as he was going to discharge it, was uncalled for and useless; that is, that the court had concluded to discharge it: that, notwithstanding the court had indicated to the jury its duties, some had persistently refused to perform them, notwithstanding it was their duty to report and return indictments to the court; and that the court had no further use for them. I have heard very reputable judges so animadvert upon grand juries. But does this show wrongful bias against the accused? It may be further said fairly, from the face of the case, that the judge thought there ought to be an indictment and trial of the facts of the case before a jury of the country, and that the indictment should be for murder, so as to let a jury pass on the true grade of the offense, if the accused was guilty. I do not see that there is anything unreasonable in this on the part of a public functionary charged in large measure with the administration of criminal law. Does it show that he enforced this indictment unduly? That it is not the free act of a grand jury? Does it show corrupt prejudice against the accused that will overthrow the indictment? We are not on the subject of final trial. Throughout the proceeding every step of the court in forming and charging the juries, ordering a new list, summoning talesmen, and in other regards, was excepted to by counsel for the accused: and there unfortunately arose much feeling between court and counsel, and heated controversy and oral altercation, but that was between court and counsel. Does it show corrupt prejudice by the judge against the accused, that led the judge to enforce, and that did enforce, this indictment? That is the point. Can all this invalidate a solemn finding of a true bill by the grand jury, and justify this Court in excusing the accused from answering before a jury whether it is a true bill? Does the mere discharge of the second jury work such a result? Does the impaneling another jury on the demand of the State's attorney, who stated that he wanted another jury

specially to inquire into this transaction, show this? Could the judge refuse such a demand? After the court's order for another grand jury, it announced to counsel that it had up to that time allowed them to discuss questions they had raised touching instructions to the grand jury and other matters, not because they had the right, or that Eastham had any standing in court until indicted, but out of courtesy, but that they would not be allowed to discuss any question relating to the summoning, impaneling, or organization of the next grand jury, or charges to it, but would be allowed exceptions to the action of the court, without hearing. This is relied on in the petition. What is wrong in this? Discussion of the subjects specified by the court had been had. A court has a right to limit discussion. There is no right to discuss the formation, summoning, or charging a grand jury. That belongs to the court, and is a matter largely of discretion. *Thomp. & M. Jur.* § 578. I doubt whether these matters can be made the subject of exception. I do not think they can. So far as available, it is by plea in abatement, not for exception and discussion pending the formation of the panel. In my experience I have never known it practiced. If allowed, where would it end? Is there even a right to a challenge to the panel or the polls of a grand jury unless statute gives it? *Thomp. & M. Jur.* § 507, says not. 1 *Bish. Cr. Proc.* § 876, says it does not prevail in all states. I can find no instance in Virginia. Our statute does not give it.

It is stated in the petition that when the indictment for involuntary manslaughter was dismissed the court refused to discharge the accused. The State's attorney resisted discharge, asking another grand jury. 1 *Bish. Cr. Proc.* § 870a, says that, when a grand jury has ignored an indictment, one in jail is generally entitled to discharge, but that, of course, he may be detained on an amended accusation; "and, indeed, the court may continue the case for examination at a future term, or otherwise decline the discharge, if the witness have not appeared, or the grand jury has not acted on the case." Though a misdemeanor indictment was found, yet the State not wishing to prosecute it, and asking another hearing before a grand jury, I understand it to be in the power of the court, and common practice, to

hold the prisoner at the State's motion. Our Code, in section 12, c. 158, discharges a prisoner if not indicted before the end of the second term, plainly allowing the State till then to hold the prisoner upon her charge. Though an indictment for a minor grade of offense, or a faulty indictment, be found, which the State refuses to prosecute, it is equivalent to the case of no indictment found, and under the plain intent of the statute the State is allowed to detain the defendant under the mittimus issued by the justice until the end of the second term. So I do not see that the court either exceeded its power, or erred in this matter.

Clearly, as to refusal to bail, there was no abuse of power, as that is in the undeniable discretion of the court. Of course, refusal to discharge or bail could not vitiate the subsequent indictment.

So I conclude that there is no ground for holding this indictment either absolutely void, so as to warrant prohibition, or voidable, so as to overthrow it on plea in abatement. There is no strength in petitioner's present case. The matters he complains of as irregularities affect none of his substantial rights, and are merely technical. Of course, prohibition does not lie on the theory of want of jurisdiction in the circuit court to impanel a grand jury and try a case of murder; and therefore the only theory on which to rest it is that the court, because of some of its actions, abused its lawful jurisdiction, in exceeding its powers. What do we mean by the declaration that prohibition lies when a court in the exercise of a conceded jurisdiction abuses its powers? I answer that it is where the court on its way in the case does some collateral act which under no circumstances, on any state of facts, it could do in the case. If it be a mere mis-step, an error of judgment, in the regular disposition of the case, I say in the line of the case, writ of error, not prohibition, lies, as perhaps where a justice holds plea of a money demand over three hundred dollars, or as in *McConiha v. Guthrie*, 21 W. Va. 134, where a court, though it had jurisdiction to condemn land for public use was proceeding to condemn land within twenty feet of a dwelling, because that was prohibited by law,—under no circumstances could be done. That case I have always doubted, as there was jurisdiction, and the

error was correctible by writ of *certiorari*. So where a unit cause of action is split into several. There is no other remedy against a plain abuse. This qualification to the rule against prohibition where the court has jurisdiction, namely, that it lies where there is an abuse of power, is shadowy and ill defined. Unless limited as I state, it will bring many cases into prohibition not properly belonging to it, and stop the wheels of other usual proceedings before courts have had time to even determine upon their own jurisdiction; prohibition will supplant the ordinary procedure, as JUDGE GREEN said in *Jelly v. Dils*, 27 W. Va. 272. Why not let a court go on to the end of a case, when perhaps neither writ of error nor prohibition will be called for? But it is said our statute has enlarged the scope of prohibition by giving it as of right "in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." I do not think this carries the writ further than its common-law function. *Bullard v. Thorpe* (Va.) 30 Atl. 36. Thus none of the acts of the court complained of as an abuse of power are acts of such abuse as to warrant a writ of prohibition. They are not of that character, but, if wrong, are remediable on writ of error, should it ever come to that point. But suppose them to be such acts as are an abuse of power. What then? Prohibition does not still lie, for the simple reason that, if the actions of the court that are complained of have any effect to impair the indictment, they are to be availed of by plea in abatement. In Virginia want of qualification or other objections to a grand jury are to be made effective by that plea, and writ of error in case of adverse decision on it. *Cherry's Case*, 2 Va. Cas. 20; *Long's Case*, Id. 318; *Moore's Case*, 9 Leigh, 639; *Kerby's Case*, 7 Leigh. 747. *McConiha v. Guthrie*, *supra*, decided since chapter 110, Code 1891, pointedly says that, even if there be an abuse of power, prohibition does not lie, if writ of error will cure the grievance. See *Walcott v. Wells* (Nev.) 24 Pac. 367. Look at our case of *Buskirk v. Judge*, 7 W. Va. 91, holding that, when the law indispen- sably required an examination of one charged with felony by a county court before indictment and trial in a circuit court, prohibition would not lie to stop a circuit

court trying him before examination. A much stronger case for prohibition than this. Prohibition is utterly untenable in this case.

One of counsel for the State makes, with confidence, the point that the rule for a writ of prohibition, having been issued by one of the judges of this court in vacation, was without jurisdiction in him to award it, as the Constitution gives original jurisdiction in prohibition to this Court, to be exercised only in term, and not by a judge alone. It is at once seen that this presents the question whether the last clause of section 1, chapter 110, Code 1891, allowing a judge to award a rule in vacation, is constitutional. This is a matter of gravity, and merits serious consideration; but as the rule is that, if the case can be disposed of on other grounds, a court will not pass on the validity of an act of the legislature, I will not further refer to it.

This holding only calls upon the petitioner to answer before an impartial jury of his country whether his act of slaying Thompson is a crime against the laws of his country; only demands what the law demands of all men charged with crime, that he pass what he ought to have, and unquestionably will have,—a fair, just, and impartial trial.

JUDGE McWHORTER concurs in this opinion. The Court being equally divided, the motion to dismiss fails; but then comes the application of Eastham for a writ of prohibition,—his petition and rule being, *per se*, a standing, affirmative motion. It fails, as the Court can take no affirmative action, issue no process to stay the court below, without a majority for it. This is another notable instance of the evil of the Court's being composed of an even number of judges.

NOTE BY BRANNON, JUDGE.

When I wrote the above opinion at Charles Town, I was interrupted daily by arguments of counsel and did not have access to authority. The importance of the case and the division of the Court seem to justify the addition of this note.

As to the point that the indictment is void because the court excused grand jurors because they had formed or expressed an opinion, what I said above I find justified by further examination of authority. Whar. Cr. Pl. & Prac., sec. 346, says:

"It is a good cause of challenge to a grand juror that he has formed or expressed an opinion as to the guilt of a party whose case will probably be presented to the Grand Inquest."

In the Pa. case of *Commonwealth v. Clark*, 2 Brown, 325, on full argument and consideration of Chief Justice Marshall's rule in the great Burr treason trial, a defendant was allowed a challenge, after jury was sworn, for favor in that he had expressed an opinion of the prisoner's guilt. In *State v. Bradford*, 57, N. H. 198, it was held that the court may excuse grand jurors for reasons appearing to it satisfactory, and the exercise of its discretion will not be reviewed. In *U. S. v. Gale*, 109, Justice Bradley said, as I stated above, that there was a distinction between the allowance of qualified and disqualified jurors, adding that "Disqualified jurors upon the panel may be supposed injuriously to affect the whole panel; but if the individuals forming it are unobjectionable and have all the necessary qualifications, it is of less moment to the accused what persons may have been set aside or excused. The present case is of the latter kind. No complaint is made that any of the grand jurors who found indictment were disqualified to serve, or were in any respect improper persons. It is only complained that the court excluded some persons for improper causes because they labored under the disqualification created by the 820th section of the revised statutes, which is alleged to be unconstitutional. It is not complained that the jury actually impanelled was not a good one, but that other persons equally good had a right to be placed on it."

As bearing on the contention that the excusing of jurors vitiates the indictment, and also the claim that the action of the county court in making a list for grand jury service is final, and that the circuit court can for no cause inquire into qualifications, I cite *People v. Leonard*, 106 Cal. 302, holding that the court may go into qualifications of those drawn as grand jurors, excuse some and summon others from by-standers, and that list is not final. I quote from the case of *U. S. v. Jones*, 69 Fed. R. 976: "The real contention of the defendant is, that the court had no power to excuse any grand juror for any cause whatever, unless he came within the disqualification or exemption mentioned in the statute * * * In other words, the court had no authority to excuse any juror of its own motion unless he was a minor, alien, an insane person or prosecutor * * * and that the statute furnished the only guide for the action of the court. If the first position of the contention is correct, then it would follow that if the accused whose cause was to come before the grand jury had been on the list drawn from the jury box, the court would have been compelled to accept him as a grand juror, and to have allowed him to act in all cases except his own. If twelve of the grand jurors had testified that they had formed and expressed opinions that the defendant was guilty, and that they should vote in favor of indictment without further evidence, the court would have no power to excuse them, or either of them. If it was brought to the attention of the court, in a reliable manner, that one or more of the jurors had offered in advance of being sworn, to sell his vote for any sum of money to either party, the court would have

no power to excuse the juror. These illustrations are sufficient to show the absurdity of the defendant's contention. Such results would be utterly subversive of every principle of justice; would be contrary to the spirit and genius of free institutions; would be a reproach to any court that would permit such a practice to be pursued, and a dark blot upon the jurisprudence of any country. There is no law that gives an accused person the absolute right to have grand jurors accepted by the court who have formed and expressed unqualified opinion that he is innocent. There is no law, rule or practice that compels the court to accept any grand juror to be on the panel who has formed and expressed an opinion that the accused is guilty." *People v. Durrant*, 116 Cal. 179.

It will not do to say that only the defendant can except to bias in grand jurors. The opinion just quoted repels that. One biased in favor of the accused is just as objectionable as one biased against him. I met with a case where one who was surety on the prisoner's bail-bond, was held properly rejected, but the particular case has slipped me. There are so many authorities which sustain the action of courts in excusing jurors because they had expressed or formed opinions, that they shake my mind as to the position I took in the above opinion that the court has no authority to inquire of jurors as to the formation or expression of an opinion. On second thought, the mere fact that our statute allows an indictment to be found upon the unsworn statement of two members of the grand jury does not show that it is wrong to interrogate them as to fixed opinions, because that only means that the grand jury may act on the statement of facts by two of the grand jurors, not on their mere opinions, and mere knowledge of fact is different from fixedness or prejudice of opinion. However that be in West Virginia, it certainly can be said that the action of the court was not an un-heard-of proceeding and does not nullify the indictment. Our Code on page 157, section 12, says that no indictment shall be abated because of the incompetency or disqualification of any grand juror, yet this Court is asked to hold that the presence of those jurors who took the place of the ones accused, though qualified in every respect, shall abate this indictment.

Now, as to the point that the talesmen were summoned by an unauthorized deputy, and were no grand jurors: In *Commonwealth v. Brown*, 147 Mass. 585, it was held that a person sworn as a grand juror, whose name had been placed in the jury box, and drawn by the selectmen in response to venire, though previously the town had ordered it to be stricken from the list, in the absence of his personal disqualification, would not affect the validity of the indictment. Here was one acting who was not a grand juror, but his name had been by accident left in the box after it was stricken from the list. The court said: "It has often been held in other jurisdictions that indictments by a grand jury upon which a disqualified person is sitting, is void. The disqualified

person may have been one of only twelve who voted for the indictment. 2 Hawk. P. C. chap. 25, sec. 28; *U. S. v. Hammond*, 2, Woods C. Ct. 197; *State v. Symonds*, 36 Maine, 128; *Doyle v. State*, 17 Ohio, 222; *State v. Cole*, 17 Wis. 674; *McQuillan v. State*, 8 Smedes & M. 587.

"How such an indictment should be regarded is a question we need not decide, for distinction must be drawn between a juror who is personally disqualified, and one who possesses all the qualifications but is irregularly and improperly drawn. The general rule is that mere irregularity in the proceedings, by which a juror gets upon a panel, does not affect the validity of his action. *Commonwealth v. Parker*, 2 Pick. 550, 559; *Page v. Danvers*, 7 Met. 326; *U. S. v. Reeves*, 3 Words. 199; *U. S. v. Ambrose*, 3 Fed. Rep. 283; *Hill v. Yates*, 12 East, 229, 230; *The King v. Hunt*, 4 B. & Auld. 433; *Hardin v. State*, 22 Ind. 347."

DENT, JUDGE (*dissenting*):

Robert W. Eastham, petitioner, being in custody of the sheriff of Tucker County on accusation of the felonious killing of one Frank E. Thompson, the grand jury, at the June term of the circuit court of said county, after investigating the charge, returned an indictment for manslaughter. The prosecuting attorney, being of the opinion that the prisoner should be indicted for a higher offense, with consent of the presiding judge, entered a *nolle prosequi*. The prisoner thereupon moved his discharge or admission to bail. Both motions were over-ruled. The judge directed the drawing and summoning of another grand jury for the purpose of considering the matter at an adjourned day of the term. This grand jury being duly summoned and impaneled, the judge charged them at some length to the effect that, if a homicide was shown, the jury should return an indictment for murder, and leave the degree of the offense committed to be determined by the petit jury, contrary to section 1, chapter 144, Code. Homicide was admitted, but claimed to have been justifiable. Before the jury had reached a conclusion, and while halting between two opinions undoubtedly occasioned by the erroneous charge of the judge, he, instead of correcting his error, unceremoniously discharged them as a disagreeing jury. He immediately ordered a third grand jury to be drawn, and summoned to a future day of the term, and one Haller—not a regular deputy—was appointed at his instance to assist in summoning the same.

On the return day fifteen of the grand jurors appeared, and the judge proceeded to examine them on their *voir dire*, and accepted such as were satisfactory, and rejected such others, five in number, though legally qualified grand jurors, who, for some reason not disclosed by the record, and known only to the judge, were not satisfactory to him. He then caused an order to be entered directing the sheriff to summon six others not drawn from the jury box, and yet, as shown by his answer, he did not permit the sheriff or one of his deputies to execute this order, but orally commissioned said Haller to execute the same. The jurors summoned were acceptable. Having had them duly sworn, he then proceeded to deliver a lengthy, argumentative charge, which was to the effect that, if a homicide was established by the evidence produced before them by the State, it was their duty, without calling for other witnesses or further investigation, to return an indictment for murder, and allow the petit jury to determine the degree of the offense committed. He then placed the alleged grand jury in charge of the sheriff, and would not permit them to separate or communicate with any one until they returned an indictment for murder, and received the thanks of the judge and their discharge. The judge admits the truth of this statement, in substance, as set forth, but justifies his course on the ground that it was necessary to obtain an impartial grand jury and prevent it from being unduly influenced by outside pressure. It is manifest from this that an impartial grand jury meant one that would find an indictment for murder, in accordance with the evident desire of the judge, as shown by his several instructions to the successive grand juries. That the judge, either through lack of experience or unusual zeal, was led to commit numerous errors, harmless or prejudicial, cannot be denied; nor is it our place to ascertain whether they were justifiable, under the present application.

The contention of the respondent that the clause of section 1, chapter 110, Code, is unconstitutional, in so far as it authorizes a rule to show cause to be issued by a judge of this Court in vacation, is wholly untenable. The legislature is invested with the power to regulate the practice in courts of justice, and has authority to prescribe in what manner proceedings in prohibition shall be instituted. It

might provide that it be done by notice, or by summons issued by the clerk, or by rule. There is nothing in the Constitution that prevents the legislature from imposing on the members of this Court the duty of examining the petition and awarding the rule. In furtherance of the jurisdiction of this Court during its vacation the power had to be lodged somewhere; otherwise the act sought to be prohibited might be accomplished before the court could be convened, and the writ would be too late to be effective. Following the analogy of appeals, the legislature imposed the duty on a single judge until the court should meet in term, when the object of the rule ceases, and the matter is wholly in the power of the court to abate it, renew it if faulty, or award the prohibition. Section 6, Art. VIII, Const., does not militate against this conclusion, for that is not a grant of, but a restriction on, the authority of the court or a judge thereof to grant appeals, and is to this extent a limitation on the power of the legislature to regulate the practice in such cases. The awarding of a temporary rule in prohibition being a matter that affects the remedy, but in no wise determines the rights of the parties, the legislature has absolute control thereof. The real question presented at this time for our consideration is as to whether the judge was guilty of such usurpation or abuse of power as renders the indictment void, and therefore no indictment, but a nullity. If, in the commission of the various errors complained of, he did not exceed his jurisdiction or legitimate powers, prohibition will not lie; otherwise it is the mandatory remedy. Nor is the question of adequacy or inadequacy of remedy involved, as section 1, chapter 110, Code, makes it imperative, as a matter of right, in all cases of usurpation of jurisdiction or excess of legitimate powers, notwithstanding the existence of other remedies. The statute, in derogation of the common-law, determines, without the aid of judicial interpretation, that in such cases no other remedy, however efficient, is adequate. It has thus taken prohibition out of the extraordinary, and made it the ordinary and proper remedy to restrain all inferior tribunals within the scope of their legitimate powers. Rightly so, for it affords speedy justice, without sale, denial, or delay, and promptly prevents the abusive, oppressive, or tyrannous use of judicial power in

response to partisan passion or private malice. Nor does the statute permit a court, under the pretext of determining its own jurisdiction, either to usurp powers that do not, or refuse powers that do, belong to it. *Railway Co. v. Paull*, 39 W. Va. 142 (19 S. E. 551). In such cases the court must always decide right, for it would be monstrous to refuse to allow the most ignorant criminal to plead ignorance of law, and yet accord a high judicial functionary, presumed to be learned in the law, such privilege, in justification of his assumption of illegal powers or authority. The statute countenances no such plea or excuse, and for us to entertain it is to so amend the statute as to make it read, "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power when the inferior court has not jurisdiction of the subject-matter in controversy, or, having jurisdiction, exceeds its legitimate powers," except if, through ignorance of law, and through a desire to promote the supposed ends of justice, the inferior tribunal shall decide it has jurisdiction, or is not exceeding its legitimate powers, then prohibition shall not lie, but only the usual ancient remedies. Such an amendment would render the statute nugatory, and the writ of prohibition anomalous. An inferior tribunal could always justify usurpation and abuse of power through ignorance of law and good motives. It is the duty of this Court to obey, uphold and enforce all legislative enactments within Constitutional limitations, and not, under the pretense of construing such enactments, to usurp for itself or inferior tribunals jurisdiction and powers denied by the constitution and statute, to the impairment and denial of the personal immunities and rights of citizenship. To do so is not to adjudicate, but to legislate. Judicial legislation is entirely too common, and is a very unwise, dangerous, and unnecessary experiment, to say the least. Instead of being excused or justified, it should be severely discountenanced. The plain letter of the statute, without regard to former decisions and precedents, has narrowed the inquiry in this and all similar cases to the mere question of usurpation or abuse of power.

Section 4, Art. III., of the Constitution, provides that "no person shall be held to answer for treason, felony or other crime not cognizable by a justice unless on present-

ment or indictment of a grand jury." Section 39, Art. VI., provides, "The legislature shall not pass local or special laws in any of the following cases, that is to say for * * * regulating the practice in courts of justice, summoning or impaneling grand or petit juries. * * * The legislature shall provide by general laws for the foregoing and all other cases for which provision can be made." By these two provisions, in so far as the subject-matter thereof is concerned, the common-law power of the courts as well as the legislature is restricted or entirely taken away. The grand jury referred to in the first provision is a grand jury summoned and impaneled according to the second. There is and can be no other grand jury recognized by the Constitution or statute law. Such a thing as a *de facto* grand jury, not *de jure*, can have no existence. Both must co-exist to make a legal grand jury, and there can be no other except by usurpation. It is made obligatory on the legislature to provide by general law for the summoning and impaneling of all grand juries, and it is made equally obligatory on the courts to conform strictly to the law so enacted; and it is the assured right of every citizen to require both so to do when his life, liberty, or property is at stake. When a circuit court judge proceeds by illegal methods, though his motives be ever so pure, to obtain indictment against a citizen of the state, he is guilty of usurpation of power in excess of his legitimate jurisdiction as limited and restricted by the provisions aforesaid, to the destruction of such citizen's rights thereby guarantied. "The grand jury must be selected in the manner prescribed by law. There is no security to the citizen but in a rigid adherence to the legislative will as expressed in the statutes for our general guidance." *Brown v. State*, 9 Neb. 163, (2 N. W. 380). These constitutional restrictions on the common-law powers of the courts are founded on justice, sustained by reason and experience. The English people were first compelled to adopt them to curb the oppressive conduct of the crown, exercised through its corrupt and corruptible judiciary. They were early added by way of amendment to the Constitution of the United States, and at the formation of this State were made, and have been continued as, a part of the Constitution. Prior to the separation or division they were not a

part of the Constitution of Virginia. Hence the decisions relied on to sustain the common-law powers of the judge are not applicable, but are obsolete. Formerly a grand jury was considered merely an accusing body, with which those charged with crime had nothing to do. Under our constitutions, state and national, a grand jury is recognized to be a necessary protection to the citizen against unfounded accusation or unjust prosecution, whether it emanates from "the government, or is prompted by partisan passion or private enmity." *Ex parte Bain*, 121 U. S. 1 (7 Sup. Ct. 781). And a grand jury under the law as it now exists is defined to be a judicial court of inquiry, summoned and impaneled strictly in accordance with the provisions of the general law enacted for the purpose by the legislature: and any other body of men, however well qualified individually, would be neither a *de facto* or a *de jure* grand jury, or entitled to perform the functions thereof. The following decisions fully sustain this proposition, and place it beyond controversy; *Ex parte Bain, supra*; *Finley v. State*, 61 Ala. 201; *Weston v. State*, 63 Ala. 155; *O'Brien v. State* (Ala.) 8 South 559; *People v. Thurston*, 5 Cal. 69; *People v. Coffman*, 24 Cal. 234; *Lery v. Wilson*, 69 Cal. 105 (10 Pac. 272); *Bruner v. Superior Court*, 28 Pac. 341 (92 Cal. 239); *State v. Bowman* (Iowa), 34 N. W. 767; *State v. Clough*, 49 Me. 573; *State v. Symonds*, 36 Me. 128; *State v. Lightbody*, 38 Me. 200; *State v. Fleming*, 22 Am. Rep. 552; *Clare v. State*, 30 Md. 176; *Avirett v. State*, 76 Md. 510 (25 Atl. 676, 987); *Stokes v. State*, 24 Miss. 623; *State v. McNamara*, 3 Nev. 75; *Brown v. State*, 9 Neb. 163 (2 N. W. 378); *State v. Barker* (N. C.), 12 S. E. 115; *Boyd v. State*, (Ala.) 13 South 14; *Roe v. State* (Ala.) 2 South. 459; *Brannan v. People*, 3 Utah 488; *Doyle v. State*, 17 Ohio 224; *State v. Easter*, 30 Ohio St. 542; *Portis v. State*, 23 Miss. 578; *Box v. State*, 34 Miss. 614; *Baker v. State*, 23 Miss. 243; *Miller v. State*, 33 Miss. 356; *Kohlheimer v. State*, 39 Miss. 548; *Thompson v. State*, 9 Ga. 210. To these many others could be added.

As opposed to these numerous authorities, my worthy associates rely on *People v. Petrea*, 92 N. Y. 128, as in some degree supporting the untenable position taken by them in this case. The premises on which the cited case is founded are illogical, and hence misleading. The general

law of New York required separate lists and separate boxes for the grand and petit juries. The legislature enacted a local law for the city of Albany, doing away with separate lists and boxes, and authorizing the selection of grand juries from the petit-jury list. The court held this law to be unconstitutional, as local legislation, but held that a grand jury selected thereunder was a constitutional grand jury, because "selected under color of law and semblance of legal authority." Had this grand jury been selected under the general law from the petit-jury list, it would certainly have been held to be illegal; but the fact that the legislature had authorized it by an illegal enactment is deemed sufficient to render it legal, although forbidden by the general law then in force. That is to say, two wrongs make a right, two negatives make a positive, two noes make a yes. An unconstitutional enactment can give color of law and semblance of legal authority to judicial procedure otherwise illegal, as death can give color to, and is the semblance of, life. The court takes special pains to limit its decision to the point presented, for the reason that the prisoner's rights were not in any manner interfered with, overlooking the fact that it was settling law, not for the prisoner alone, but for all the citizens of the State, and furnishing a precedent by which the rights of the citizens of all other states might be put in jeopardy. The Constitution guarantees to every person charged with an offense, however guilty, the absolute right to be indicted, tried, and convicted strictly in accordance with law; and this right ought not to be gradually construed and adjudicated away by a play on the words "*de facto*," "*de jure*," "color of legal authority and semblance of law." If constitutional guarantees can be frittered away in this manner by the courts, the public will soon learn to construe an angry mob to be a sufficient *de facto* grand and petit jury, and a rope in the hands of lawlessness to be sufficient "color of legal authority and semblance of law," because, forsooth, the victim is guilty, and thereby outlawed. It is contrary to public policy, and highly subversive of governmental integrity, to uphold as valid and legal acts done violative of individual rights in obedience to an invalid enactment of the legislature, contrary to the provision of a valid enactment then in full force and vigor. Such is not the law of this

State, but all acts done derogatory to personal rights in obedience to an unconstitutional enactment are utterly null and void, and the only saving with regard thereto is that no officer shall be held civilly or criminally liable for the lawful exercise or discharge of his duty under an act of the legislature afterwards adjudged to be unconstitutional. Code, c. 147, s. 18. The respondent in the case under consideration admits that he purposely and materially departed from the method provided by the legislature for the selection of grand juries. Justification of his course is sought under his common-law powers. These, as heretofore shown, are clearly abrogated by the constitution and statute enacted as a substitute therefor. But to be more explicit, even to needless repetition, section 10, c. 157, Code, which authorizes the summoning of another grand jury when one has been duly discharged, in case an unforeseen exigency therefor should arise, does not authorize the discharge of one grand jury because it refuses to be governed by the illegal instructions of the judge, and the summoning of another who will quietly submit to such instructions. The right to discharge one for such cause, and summon another in place thereof, necessarily includes the right to discharge and summon successive grand juries, many in number, until one be obtained subservient to the wishes of the judge. An indictment thus begotten is a legal abortion, which should perish in the sin of travail. Such was not the intention of the legislature, and such abuse of power should not be tolerated. *O'Brien v. State, supra.*

It was judicial usurpation or abuse of power to place the grand jury in custody of the sheriff. The grand jury is designed to be an independent court of inquiry, selected from among the best citizens of the county; and while nominally under charge of the court, as a constitutional adjunct thereof, the jurors are entitled to the same freedom of person, and to be regarded as of equal integrity and as free from bias and undue influence, as the judge himself. And they would have the same right to suspect and charge undue influence against him as he against them. Sixteen men are no more liable to disregard their solemn oaths, through prejudice, bias, partiality, or undue influence, than one. They are as sixteen to one. The stand-

ard by which we should measure other men of equal standing and credibility is our own integrity. Our minds should furnish the true gauge of honesty. A petit jury is usually detained in custody for the protection of the prisoner, and he alone can complain of its separation. This grand jury is claimed to have been kept in custody to protect it from the prisoner or his counsel, officers of the court. If such was the only purpose, the error might be overlooked as harmless, though the excuse is not a legal justification. If, on the other hand, it was a show of authcrity, for the purposes of coercion and intimidation under illegal instructions and illegally limited evidence, to obtain the character of indictment sought, any action resulting therefrom would undoubtedly be illegal and void. Such excessive power, though honest in purpose, should be denied because in unscrupulous hands it might be used to further dishonest ends. To keep the fountain of justice pure and above reproach, the very appearance of evil should be avoided. This Court might as well be placed in custody of a sheriff, as a grand jury; for, within their respective spheres, they are equally independent and co-ordinate members of the same judicial system. When the noble independency of the grand jury is destroyed the efficiency of our judicial system goes with it, and "a government of the people, by the people, for the people," is placed in jeopardy and doubt. Our government rests, in theory and practice, wholly on the American integrity of its citizens; and if the noblest of these cannot be trusted to faithfully discharge the duties of grand jurors without being restrained, in imitation of star-chamber methods, of their freedom, as suspicious culprits, the foundation on which our free institutions rest are but the shifting sands of the seashore, and our existence as a nation depends entirely on the uncertain props furnished by a judiciary chosen from the same class of depreciated citizenship,—a little more learned in the intricacies of the law, but none the more proof against corruption. In commendation of the grand-jury system a great jurist once said: "In their independent action the persecuted have found their most fearless protectors, and in the records of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance of prejudice."

To disparage or destroy the independency is a crime against free government. But the most glaring innovation and usurpation of power was the assumed authority to examine the regularly summoned and duly qualified (according to legislative requirement) grand jurors on their *voir dire*, and to reject some and accept others according to the mere whim and caprice of the judge, and then cause the vacancies purposely created to be filled by persons summoned, by private direction of the judge, by a private person, other than the sheriff or his duly qualified deputies; thus setting at naught the law and the Constitution, and clothing himself with absolute power to determine arbitrarily of what person the grand jury should consist.

Gen. Washington (a man whose patriotism is not now open to question), in his Farewell Address, commenting on party spirit, used this memorable language: "This spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind. It exists, under different shapes, in all governments, more or less stifled, controlled, or repressed; but in those of the popular form it is seen in its greatest rankness, and is truly their worst enemy." 1 Mes. Pres. 218. Partisan prejudice and passion thus recognized pervade our whole political system, from the highest court to the humblest citizen in the land. It is stronger and more pronounced in some persons than in others. There may be those who are entirely free from it, but such is not the rule. On the other hand, there are those of such ardent and zealous dispositions as to be unable to repress their feelings or brook opposition, so that they are wholly incapacitated from doing justice to those who do not affiliate with them politically. Clothed with the power, they would make a holocaust of their foes, while they are ready to canonize their friends, in whom they can see no guile. This is to be deplored, and is a blot upon the fair name, and a hindrance to our country's progress. But it is a fact that can neither be parried, denied, nor ignored. Not a theory, but a condition of degenerate human nature, which must be met and repressed by gentle, firm and judicious measures, to insure the perpetuity of self-government. It would be destructive of the peace of the land,

and productive of continual strife, recrimination, and bitterness, if judge or juror was subject to direct challenge because of partisan prejudice or bias. Hence such a challenge is contrary to public policy. But the reservations and limitations of the constitution were conceived by wise statesmen, and intended to remedy this great and dangerous evil, and restrict it within minimum and reasonable bounds. None of these are more potent for good in furthering the design of their conception than the requirement that the legislature shall not enact special, but shall enact general, laws regarding all subjects of legislation, where the same can be made applicable. General laws secure equal rights to, and impose equal burdens on, all citizens alike. And the protection of the citizen against partisan passion and private enmity under color of the discharge of official duty was the real great object had in view when it was made the duty of the legislature to provide by general law for the summoning and impanneling of grand juries. To allow special legislation in such cases would operate harshly, unequally, and unjustly; and if the courts are permitted to disregard such general legislation, and arbitrarily adopt methods of summoning and impanneling grand juries, constitutional limitations and securities would be rendered of no effect. The courts would enjoy the privilege of legislation denied to the legislature, and could thereby repeal, alter, or amend general legislation so as to make it special, and produce the very inequality of rights and burdens the Constitution seeks to obviate. The mere fact of immediate execution as against one person would not change it from a legislative to a judicial act. Place such power in the hands of an unscrupulous or vindictive partisan judge, with a prisoner of opposite politics in custody, and how promptly will such judge, under the influence of private spleen or party pressure, make up a grand jury selected from his partisan constituents, and thus produce a partisan, biased, and pliable body of men, ready to respond to the illegal instructions of the judge, in mere reflection of his will, and persecute a person for his politics, rather than punish him for crime. Because such power is dangerous in the hands of the unscrupulous or malicious, it is denied to all. The rain, to produce equality, must fall on just and unjust, partisan

and non-partisan alike. To obviate the difficulty of partisanship, the legislature has provided for the selection of jurors, as near as may be, by lot, limited to a given number of the better class of citizens subject to jury service; not authorizing the sheriff to supply any other than adventitious vacancies. To the judge no power is given in the selection of grand jurors, but he is removed from partisan bias and temptation. The law, properly enforced, of its own vigor makes the selection without his assistance. His duty is to see that the law is enforced. This is the method approved by experience and reason as the most fair and just to every person likely to be charged with crime. And, while not wholly free from objection, a better is yet to be devised by the increasing wisdom of the future. Grand jurors selected in this manner are not subject to challenge for any cause,—not even for partisan bias or prejudice, be it ever so pronounced or bitter. 3 Rob. Prac. pp. 88, 89, 92; Matth. Cr. Law, 111, note; *State v. Hamlin*, 47 Conn. 95; *People v. Northey*, 77 Cal. 618, (19 Pac. 865, and 20 Pac. 129); *Com. v. Woodward* (Mass.), 32 N. E. 939; 1 Kelly's Rev. St. W. Va. 433.

The guaranteed right of the accused is nothing more than to have the grand jury selected in accordance with the law as written, and this he may demand as the palladium of his liberties and his city of refuge. It may be possible that under this system the guilty may sometimes escape merited punishment. Far better that this should be the case than that judicial despotism should be enthroned as a permanent part of our jurisprudence. The favorite and probably conscientious argument in justification of the infamous judges of history was that the king's enemies could not be punished by the ordinary methods of judicial procedure, and therefore extraordinary and extrajudicial means must be invented, as a *denier* resort, to preserve and vindicate the majesty of the law. It is here urged, with a show of sincerity and conscientious discharge of duty, that because two grand juries, composed of thirty-two upright citizens, duly qualified and chosen in the manner provided by general legislative enactment, refused to indict, the judge was justified in adopting extralegislative means to obtain an impartial grand jury that would indict the prisoner. "Impartiality" is made synonymous with

"indictment." To be impartial, the grand jury must agree with the impartial opinion of the judge that the prisoner should be indicted for murder if a homicide, not denied, was shown in evidence. In other words, it must reflect the will of the judge, or be discharged with a public and extrajudicial rebuke. If this is not the exercise of despotic judicial power, such a thing is impossible, and *Magna Charta* is the monumental mistake of the ages. But it is said in mitigation thereof and in apology therefor that this was only a grand jury, and the prisoner is entitled to his trial by petit jury. If the same extralegislative methods in disregard of general enactment are to be resorted to in the summoning, impaneling, and charging a petit jury, the same rank injustice may be expected to follow as the certain result. The ancient legal and religious maxim is equally applicable to the judiciary as to witnesses: "He that is unjust in little will be unjust in much." "False in one thing, false in all."

My conclusion, therefore, is that the circuit judge, in summoning, impaneling, charging, and controlling the third and last so-called "grand jury," exceeded his legitimate powers and jurisdiction, in violation of the express limitations of the Constitution and the guaranteed rights of the prisoner, and that the indictment obtained by such illegal methods is void, and that the trial thereof should be prohibited. The guilt of the accused is not now in question. The guilty, until convicted, are entitled to the same rights and securities as the innocent. The respondent claims to set out the evidence as detailed before the several grand juries. If true, it makes a clear case for indictment, and it is inconceivable that a legal grand jury should refuse to indict. But the statement of the evidence is controverted by affidavit, and by two legally selected grand juries refusing to indict,—the last in disregard of positive and illegal instructions of the judge,—and by the alleged necessity of illegally obtaining and controlling an alleged impartial grand jury before an indictment could be obtained. This is undoubtedly sufficient to raise the presumption that the possibility of convicting the prisoner on a charge of murder, if a fair trial in accordance with law be afforded him, is but slight. And it being inhuman, contrary to the bill of rights, and wholly unnecessary, even

in response to popular and partisan clamor, to punish before trial and conviction, the accused should be admitted to bail, if thereby his appearance to answer any legal indictment that may be preferred against him may be secured. Nor are these conclusions in any manner harsh to the prosecution. For, if the prisoner's guilt is as claimed by the respondent, a grand jury summoned and impaneled according to legal methods will not hesitate to indict him: and it is to the glory and honor of the State that its just and impartial laws as written in its statute books should be upheld and vindicated for the welfare and peace of all its citizens, rather than that the despotic usurpation and abuse of legitimate power on the part of its judiciary should be excused or palliated, much less extolled, justified and defended for future precedent. That state is alone worthy of the name that can throw around the property, liberty, and life of its meanest citizen the protecting ægis of just, fair, and equal laws, administered according to the plain letter thereof, without fear, favor, or affection, by a pure, impartial, and incorruptible judiciary, unmoved by party passion, clamor, or enmity. The writ should be awarded as a matter of right.

After an order had been entered refusing a writ of prohibition in the foregoing case, the counsel for petitioner moved for a rehearing, which motion was overruled by a divided court; and JUDGE DENT filed the following note:

NOTE BY DENT, JUDGE:

I am in favor of reargument of this case, and believe it should be granted. This being a matter of original jurisdiction, the result of a divided court is simply null. It determines nothing, but leaves the controversy as though there had been none. This Court owes it as a duty to the public to reach an agreement and decide the case, if possible. Both divisions may be wrong, but both cannot be right. Whichever may be wrong may be placed right on a reargument. Not only this, but the rule should be, in case of a divided court, that a reargument ought to be had, as a matter of judicial respect and concession, at the instance of a single judge, without regard to his position; for, if he is open to conviction on reargument, the court may arrive at an agreement and decision, and thus discharge its official trust in a beneficial manner to the public. Yet I recognize that such rule cannot be established except by concurrence of a majority of the Court, as affirmative action is required. Two members thereof, while they prevent, are powerless to produce, results, when negatively op-

posed by the others. No case should be left undecided when there is a possibility of agreement. I unhesitatingly say that, while I have a positive opinion, I do not cherish it as infallible, but I am open to conviction, ready to be convinced of error, and earnestly desirous that the law of this case should be properly, finally, and rightly determined and settled. Here at Charles Town I have been unable to find the authorities necessary to a thorough and exhaustive examination of the questions involved, and for this reason my conclusions are embryotic.

Denied.

CHARLES TOWN.

Ex Parte EASTHAM.

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(McWHORTER, JUDGE, *concurring*).

(ENGLISH, PRESIDENT, and DENT JUDGE, *dissenting*).

Submitted September 3, 1897—Decided September 14, 1897.

1. HABEAS CORPUS—*Bail*.

Can the Supreme Court of Appeals admit to bail upon *habeas corpus*? (p. 638.)

2. BAIL—*Homicide*.

As to bail in a murder case. (p. 639.)

Habeas corpus by one Eastham. Prisoner remanded by operation of law, because of a divided court.

Denied.

C. W. DAILEY, F. M. REYNOLDS, MARSHALL McCORMICK, C. O. STRIEBY, J. T. MCGRAW, W. B. MAXWELL, H. G. MOFFETT, and F. C. REYNOLDS, for petitioner.

A. G. DAYTON, J. J. DAVIS, JOHN A. HOWARD, WM. C. CLAYTON, A. M. CUNNINGHAM, A. B. PARSONS, and WM. G. CONLEY, for respondent.

BRANNON, JUDGE :

Eastham, being confined in the jail of Tucker County under a mittimus from a justice and an indictment for murder, obtained from a judge of this Court a writ of *habeas corpus* seeking discharge, or, if that be not granted,

then that he be granted bail. As to his application for release on grounds alleged to work the nullity of the indictment, I can not favor it, for reasons given in my opinion in the case of prohibition, this term, of *Eastham v. Holt*, 27 S. E. 883. And, if the indictment were even void, that would not discharge, for there is the commitment by the justice, warranting his detention.

I can not agree with JUDGES ENGLISH and DENT in bailing the accused. Can this Court grant bail? The Code (chapter 156, section 6) grants that power only to justices and circuit courts and their judges. After giving justices limited bail power, it grants wide power to circuit courts, but none to this Court. Did the legislature intend to limit the power to those courts? If we have power, it is not by statute, but springs from our jurisdiction in *habeas corpus*, as an incident to its exercise. The law generally seems to be that on *habeas corpus* the court may grant bail. 9 Am. & Eng. Enc. Law, 204; *Williamson's Case*, 67 Am. Dec. 374. But under our statute it was made a *quere* whether this Court could bail on *habeas corpus*, in *Quarrier's Case*, 5 W. Va. 48. To me that *quere* is serious, on reading the statute, which seems to intend to limit the bail power to circuit courts in the first instance; the way for redress, if any, in the improper exercise of the power, perhaps, being on writ of error. In this case bail was refused by the circuit court. Can we use *habeas corpus* as an appellate proceeding and reverse the circuit court? It is not an appellate proceeding. We can not review the circuit court's action in the case, either in its procedure as to the grand jury or as to bail. *Ex parte Mooney*, 26 W. Va. 36; *Ex parte Evans*, 42 W. Va. 242 (24 S. E. 888). Can we use this writ, however, regardless of the circuit court's action on bail, as an original process to procure bail? If so, it opens this Court to applications for bail in every and any case where the circuit court has refused bail. I see that section 6, chapter 111, Code, says that in *habeas corpus* the court shall discharge, remand or bail, thus inclining me to the conclusion that this Court can bail. The other judges think so. I will not say finally, because I do not think a case for bail is made. Now, the general rule is that a capital case is not bailable, except under strong showing of no probable cause to charge the accused. As 9 Am. & Eng.

Enc. Law, 204, says, it rests "in the sound judicial discretion of the court, who will not grant it except under extraordinary circumstances." And 1 Bish. Cr. Proc. § 256, says: "In the exercise of the judicial discretion, it is the common rule to refuse bail in a capital case; and if the guilt is plain, as, for example, where the prisoner acknowledges it, the rule is nearly or quite universal." Bishop means, by the prisoner's acknowledging it, acknowledging the homicide. The accused in this case acknowledges the killing. I understand the almost universal practice is to refuse bail in West Virginia in murder cases. This party rests under an indictment charging murder, which furnishes strong presumption of guilt, on a motion for bail. *People v. Tinder*, 81 Am. Dec. 77, and note; *Ex parte Goans* (Mo. Sup.) 12 S. W. 635. And, even if that indictment were void, we would consider it on a motion for bail. In view of that indictment, and the evidence taken before the grand jury, and as murder cases are not generally bailable, I can not grant bail, and would remand the accused.

Denied.

Fall-Special Term, 1897.

CHARLESTON.

JOHNSON v. CHAPMAN *et al.*

Submitted June 4, 1897—Decided November 10, 1897.

1. ACTIONS—*Joint Actions—Joint Tort Feasors.*

Where two contiguous buildings fall upon and crush a third, by reason of the co-existent and concurring negligence of the respective owners thereof to keep their separate walls in repair, the owner of the injured building may maintain a joint or separate suit against the owners of the defective buildings. (p. 644.)

2. INSANE PERSON—*Committee—Duty of Committee.*

Under section 37, chapter 58, of the Code, it is the duty of the committee of an insane person to sue for injuries done to the real or personal estate of his ward. (p. 645.)

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56	62
43	639
165	672

3. TENANT FOR LIFE—*Injuries to Realty—Damages.*

A life tenant in possession is entitled to sue for damages done the property, by which the rental value thereof is diminished or destroyed. The measure of damages, as in other cases, is the amount necessary to make good the loss, which must be determined by the jury from the facts and circumstances shown in evidence. (p. 646.)

Appeal from Circuit Court, Ohio county.

Action by William D. Johnson, committee for Elizabeth Turner, against William H. Chapman and Tempest T. Hutchinson. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

Reversed.

GEO. E. BOYD & SON, for appellant.

WM. P. HUBBARD and HENRY M. RUSSELL, for appellees.

DENT, JUDGE :

The Circuit Court of Ohio County entered a judgment on the 30th day of May, 1896, sustaining a demurrer to the declaration, and dismissing a suit instituted by William D. Johnson, committee for Elizabeth Turner, an insane person, against William H. Chapman and Tempest T. Hutchinson, to recover damages for injuries sustained by the estate of such insane person by reason of the negligence of the defendants. A writ of error was awarded by this Court. The grounds of demurrer relied on are (1) the misjoinder of causes of action; (2) the committee suing without legal authority; (3) the injury sustained by the lessee in possession, and not the life tenant; (4) the measure of damages improperly alleged to be the amount required to restore the property to its former condition.

The circuit court confined itself to, and sustained, the demurrer, by reason of the first ground presented; no doubt, deeming the other untenable. On this point there is in reality no difference in the law governing the same, as urged by the counsel for the parties, or as expounded in the opinion of the court, but the trouble seems to be in the application of the law to the allegations of the declaration. The opinion of the judge, which is made a part of the defendants' brief, is as follows: "The defendants demur to the declaration filed in this case, and to each count thereof,

together with so much of the first count as relates to the southern or outside wall therein mentioned, on the ground of misjoinder; it being shown that neither count shows that the injury complained of was the result of a joint wrong. In 1 Jagg. Torts, 212, 213, it is said: 'There is a marked distinction between a tort and liability arising from a tort. The liability, as between the plaintiff and the defendant, may always be treated as several, but the wrong itself may be jointly done or severally done by the defendants. If it be jointly done (that is in concert), the defendants are joint tort feorsors. If it be severally done (that is, independently, though for a similar purpose and at the same time, without any concert of action), they are several tort feorsors. None the less, ordinarily, both parties guilty of concurrent negligence may be sued jointly, though they had no common purpose, and though there was no concert in action.' In Cooley, Torts, 89, it is said: 'A fourth proposition may be stated thus: That, if the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury.' These principles are sustained, not only by the numerous cases cited, respectively, in support thereof by the writers above quoted from, but also by the following, among others, not so cited: *Sloggy v. Dilworth*, 38 Minn. 179 (36 N. W. 451); *Langhorne v. Railway Co.* (Va.) 22 S. E. 159; *Blaisdell v. Stephens*, 14 Nev. 17; *Miles v. Du Bey*, (Mont.) 39 Pac. 313; *Sellick v. Hall*, 47 Conn. 260; *Bard v. Yohn*, 26 Pa. St. 482; *Stanley v. Railroad Co.* (Mo. Sup.) 21 S. W. 832; *Railway Co. v. Croskell* (Tex. Civ. App.) 25 S. W. 486; *Waller v. Railway Co.*, 59 Mo. App. 410; *Koelsch v. Philadelphia Co.*, 152 Pa. St. 356 (25 Atl. 522). In *Stanley v. Railroad Co.*, *supra*, on page 836, it is said: 'There is no doubt about the proposition that joint tort feorsors are each liable, but, to hold them jointly liable, they should have either acted in concert, or the act of one would naturally result in causing the act of the others.' In *Railway Co. v. Croskell*, *supra* (page 486), the principle is announced that, to hold several jointly liable for an injury, it must have resulted proximately from their joint and concurrent negligence. In *Waller v. Railway Co.*, *supra*

(page 426), it is said: 'The case is grounded on two causes contributing to the injury; and it has been well said that when several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of these causes. *Ring v. City of Cohoes*, 77 N. Y. 83. There was here, according to the evidence, two efficient, proximate causes, both contributing to the injury inflicted. The party, therefore, who by his or its negligent act brought about one or both of these, is liable for the injurious consequences.' In *Koelsch v. Philadelphia Co.*, 152 Pa. St. 364 (25 Atl. 524), it is said: 'The concurrence of the presence of the gas and the lighting of the match, the negligence of the defendant with that of Walters, was necessary to, and did, cause the explosion.' In a note to *Village of Carterville v. Cook*, (Ill. Sup.) 16 Am. St. Rep. 251 (s. c. 22 N. E. 14), it is said: 'Where one act of negligence unites with another and like act, or with any other cause, in inflicting injury upon the person or property of another, whose negligence has not also contributed to his injury, and there exists no means of determining the extent to which the injury resulted from either negligent act, it is obvious that each person guilty of negligence must be either held entirely exonerated, or as answerable for the whole damages inflicted in part by his negligence. In all instances in which his negligence can be regarded as the proximate cause, or as one of the proximate causes, of an injury, he is answerable for the whole thereof, either separately or jointly, and severally with any other person whose negligence or other wrongful act may also have been one of the proximate causes of such injury.' The foregoing quotations, which were made for the purpose of illustration, show that two persons cannot be guilty of 'concurrent negligence,' so as to authorize a joint action against them for the injury resulting therefrom, unless the negligence of each was one of the efficient, proximate causes of the injury. Now, the first count of the declaration under consideration alleges, in substance, that on January 10, 1895, Elizabeth Turner was tenant for life of two warehouses situated on the east side of Main street, in this city; that the defendants were possessed of certain other warehouses, adjacent to, and north of, those

above mentioned; that the southern and outside wall of the warehouse possessed by the defendant Hutchinson was weak, unsafe, and defective, and wholly inadequate to support his said warehouse; that the party wall between the last named warehouse and that possessed by the defendant Chapman was also weak, defective, and wholly inadequate to support the said warehouses; that the defendants, whose duty it was to repair and strengthen the same, wrongfully and unjustly suffered and permitted the said party wall to be and continue unsafe, *etc.*; and that the defendant Hutchinson, whose duty it was to repair and strengthen the southern or outside wall of his warehouse, suffered and permitted the same to be and continue unsafe, *etc.*, by reason whereof the said walls and the said warehouses fell, and in falling crushed into and knocked down and destroyed the walls, *etc.*, of Elizabeth Turner's warehouses. From these allegations it may be gathered that the defendants were severally, and not jointly, guilty of the negligent acts charged, namely, that of not repairing and strengthening their respective walls; but whether these acts, although several, concurred, each as an efficient, proximate cause, in producing the injury complained of, cannot be ascertained therefrom. Hence, as the count does not show a joint cause of action against the defendants, the demurrer must be sustained. And the second count, it seems to me, is defective for the same reason."

Herein we find the law fully and carefully stated. Error, however, is plainly apparent in the conclusion reached when applying the law to the allegations, which is here repeated in italics: "*From these allegations it may be gathered that the defendants were severally, and not jointly, guilty of the negligent acts charged, namely, that of not repairing and strengthening their respective walls; but whether these acts, although several, concurred, each as an efficient, proximate cause, in producing the injury complained of, can not be ascertained therefrom.*" If it is meant by this that it is not apparent from the declaration that each of the separate acts of negligence was sufficient in itself, alone, to have produced the injury, then the statement is true, for the declaration does not so allege; but, on the other hand, if it is intended to mean that the separate acts of negligence co-existing did not jointly concur to produce

the wrong complained of, then the statement contradicts the plain allegations of the declaration, which, after setting out the separate acts of negligence, says, "by reason whereof," to wit, the separate acts of negligence so set out jointly, concurring, produced the injury sued for, which was a single injury, to wit, the destruction of the property in controversy. To arrive at such a conclusion, the judge, instead of regarding the allegations as true, controverted them, and in effect, held that although the declaration alleges that the separate, co-existent acts of negligence jointly concurred in producing the wrong complained of, yet because it can not be gathered from the allegations that each was an efficient, proximate cause in producing the injury complained of, the defendants would be liable separately, and not jointly. His honor must have had some other state of facts in his mind than those contained in the declaration, when he made this ruling, and thus been misled into the error committed; for to say that an injury was caused by two separate, co-existent, concurring acts of negligence, is equivalent to saying that each was an efficient, proximate cause, contributing to and producing such injury, and that it was not the result of one of the causes alone, but by both concurring. It might not have happened, but for the concurrence. A strong pillar and a weak one may support a wall, but, if they are both weak, the wall will fall. Two separate persons are obligated to make each pillar strong. If either does his duty the wall may stand; but if each neglects his duty, and the wall falls, they are jointly and severally liable for the injury that follows to any one. As each contributed to the injury, they are each liable for the whole injury, and therefore can be sued jointly without in any wise increasing their separate liabilities; and of such suit neither has any right to complain. Nor is it necessary for either, to escape liability himself, to show the other at fault; but he is only called upon to defend himself, in case there is evidence tending to show his guilt, by establishing his freedom from blame. It is not a question of comparative negligence, but of contributory; for, if the negligence of one of two defendants contributed towards the injury, he can not escape liability by showing greater negligence on the part of his co-defendant. Such a question might affect the

matter as between themselves, but not the right of the plaintiff to compel either or both of them to pay his whole damage.

The illustration given by defendants' counsel of two persons shooting a third, if carried far enough, would have rendered this matter plain. If two persons at the same time shoot a third, with separate pistols, in different, and not vital parts of his body, they are separately liable for the injury produced; but if they both strike a vital part of the body, and death ensue, then they would be jointly and severally liable. And the same would follow if both should strike the same eye and destroy it, or strike separate eyes and destroy sight. In each case each would be equally to blame for the resulting injury. In the case under discussion, according to the allegations, each of the defendants was guilty of negligence, in not having a sufficient wall to sustain his building, by reason whereof both buildings fell upon and destroyed plaintiff's building. They did not fall at different times, nor on different parts of plaintiff's building, as appears from the declaration, but fell together, in one mass, undistinguishable, upon and crushed the same, so that it is impossible to say which produced the greater ruin, or to separate the extent of damage by each; but, both contributing thereto, both are liable for the whole damage done, and can not complain because they are both brought before the court in the same suit. If, on the evidence, it should turn out that either was not guilty of the negligence charged, such defendant would go free, while the other, being guilty, would have no reason to complain of the misjoinder.

The second ground of demurrer is sufficiently answered by section 37, chapter 58, Code, which is as follows, to wit: "The committee of an insane person shall be entitled to the custody and control of his person (when he resides in the state and is not confined in another hospital or jail); shall take possession of his estate, and may sue and be sued in respect thereto, and for the recovery of debts due to or from the insane person. He shall take care and preserve such estate, and manage it to the best advantage," *etc.* Section 38 provides: "If the personal estate of such insane person be insufficient for the discharge of his debts, and the residue thereof, after the payment of the debts,

and the rents and profits of his real estate, be insufficient for his maintenance and that of his family, if any, the committee of his estate may petition the court by which he was appointed, for authority to mortgage, lease or sell so much of the real estate of such insane person as may be necessary for the purposes aforesaid," *etc.* The word "lease," here used, does not refer to the annual rental of such real estate, which is included in the general powers of the committee, as is clear from the context, but to some act extending to and affecting the corpus of the property, such as mining for coal or other minerals, cutting timber, or doing other acts which, if done without authority, would be considered waste or destruction of the freehold. To do any act of this character, the committee must have authority from the court on a proper showing of the necessity therefor, but not so as to the annual rental thereof, or keeping the same in proper repair, which is a duty incident to, and imposed upon him by, his appointment. And if he exceeds his legal authority, to the enhancement or preservation of the estate, the court, on proper application and showing, will ratify and confirm his action. A mere trespasser, however, has no right to object to his conduct of the estate. It was not only the legal right, but it is made the legal duty, of the committee to sue in case of trespass thereto.

The third ground relied upon is equally untenable, for there is nothing in the declaration to show the character of the lease, as to whether there were any conditions or covenants to repair, and pay rent in any event, or otherwise, but simply an allegation of the naked renting of the property in its then condition, which would preclude the idea that the lessee was to restore the building, or pay rent for its use and occupancy after it was destroyed without fault on his part. He rented and covenanted to pay for a building, and not a ruin. The authorities referred to do not sustain the argument of counsel. *Tayl. Landl. & Ten.* § 520; *Gates v. Green*, 27 Am. Dec. 68.

The allegations relating to the measure of damages do not render the declaration demurrable, although they may amount to mere surplusage, as the measure of damages is the amount necessary to make good the loss sustained, which must be determined by the jury from the facts and

circumstances shown in evidence. For the foregoing reasons the judgment is reversed, the demurrer overruled, and the case is remanded for further proceedings.

Reversed.

CHARLESTON.

MILLER v. HARE.

Submitted February 4, 1897—Decided November 10, 1897.

1. EQUITY PRACTICE—*Bill in Equity—Demurrer.*

A general demurrer to a bill in equity is properly overruled, if the bill as a whole states facts which entitle the plaintiff to relief. (p. 657.)

2. ESTOPPEL—*Booms—Nuisance.*

H., after acquiescing and even assisting M. in maintaining a boom for the catching and preserving of ties, timber, etc., and receiving the benefits thereof in the saving of large numbers of his ties at an expense far less than it must have cost him if they had passed beyond the boom, can not, in a court of equity, be heard to say that the boom was constructed and maintained in violation of law, and was a public nuisance, interfering with steamboat navigation, and therefore that he should not be required to pay a just and reasonable compensation for the catching and preserving of his said ties in said boom. (p. 660.)

3. NUISANCES—*Booms—Damages.*

If a boom is erected and maintained on a navigable stream in violation of law, and is therefore a public nuisance, an individual has no cause of complaint aside from that of the common public, unless he suffer a special and peculiar damage therefrom, distinct and apart from the common injury. (p. 660.)

Appeal from Circuit Court, Wood County.

Bill by D. M. Miller against John A. Hare. From a decree confirming the commissioner's report in plaintiff's favor, defendant appeals.

Reversed in part, and decree entered.

J. G. McCLUER, for appellant.

V. B. ARCHER, for appellee.

43	647
51	497
52	339
43	647
53	211
43	647
59	455
60	288

McWHORTER, JUDGE :

D. M. Miller filed in the clerk's office of the Circuit Court of Wood County, on the 24th day of June, 1893, his affidavit for an attachment against the estate of John A. Hare, on the ground of non-residence of the defendant, claiming that he was justly entitled to receive from the defendant in the suit which was about to be instituted in the said court the sum of eight hundred dollars, as set out in said affidavit; and at the same time filed his bond, with security, in the penalty of one thousand six hundred dollars, and caused orders of attachment to be issued from said clerk's office to the sheriffs of the counties of Wood and Wirt, respectively. The former was levied by the sheriff of Wood County, June 26, 1893, on one barge of ties, containing two thousand ties. The latter was on the same day levied by a constable of Wirt County on one boat load of ties. Defendant afterwards, on the 8th of July, gave bond and took possession of the property so levied upon.

At the July rules plaintiff filed his bill, alleging that he was the owner of a certain boom near the mouth of Hughes river, in Wirt County, W. Va., used for the purpose of catching timber and railroad ties which might be drifting in said river; that said river is one of the large tributaries of the Little Kanawha, and as such a part of the Little Kanawha river; that there was no boom in use for the catching of timber drifting in said Hughes river below the point where plaintiff's boom was located in said river, and no means, by boom or otherwise, below his boom for the preservation of logs, trees, railroad ties, *etc.*; that in the fall of 1892 and the spring of 1893 he caught in the said boom railroad ties which were drifting in said Hughes river belonging to the defendant, John A. Hare, to the number of nine thousand five hundred ties; that he preserved said ties in said boom, and notified the defendant, John A. Hare, that his ties had been caught, and demanded from him payment of the compensation prescribed by statute in relation to drift property, and that defendant wholly refused to pay plaintiff the amount which he was entitled to for catching and preserving them; that he is entitled to receive from the said Hare the sum of six cents for each and every tie caught and preserved by him; that the defendant had recently taken possession of his said

ties without plaintiff's consent, and proceeded to load the same in barges; and that, at the time of the institution of this suit, he was shipping the same to market, without paying plaintiff the amount due him for catching the same, and without settling with plaintiff, although he had often been requested so to do; and alleging the non-residence of the defendant, and that he had no property within the knowledge of the plaintiff save and except the property attached in this case, unless it was some cross-ties which are still on the waters of the Little Kanawha, but of the quantity or location thereof plaintiff was not advised and could not charge. Further alleging that the said ties were branded by the brand belonging to the said John A. Hare, —that is, the letters "J. H."; that, had it not been for his catching said ties, the same would have drifted out into the Little Kanawha, and ultimately into the Ohio river, and would have been lost or scattered along said river, by which defendant would have been damaged to a much greater extent than the value fixed by the statute for catching and preserving the ties; that he had preserved said ties in his boom at his own cost and expense; that the said ties filled plaintiff's boom, and, by reason of the plaintiff's preserving the ties of defendant, he was totally unable to take care of his own ties, which were too numerous to preserve after said boom was filled with the ties of said defendant, and plaintiff was put to great cost and expense in securing his own ties, which drifted out into the Little Kanawha and Ohio rivers, which would not have been the case had plaintiff not caught and preserved the ties of said defendant,—all of which the said defendant well knew at the time he took possession of the ties from plaintiff's boom, and refused to pay plaintiff the compensation fixed by statute; that he filed an affidavit, and caused an order of attachment to be issued from the clerk's office of the said court of Wood County, and by virtue of said attachment the sheriff of Wood County had levied upon and attached a barge of ties, containing about two thousand, as the property of said Hare, which was then in possession of the sheriff; and that a copy of said order of attachment was also sent to the sheriff or any constable of Wirt County, which was levied also upon a lot of ties in Wirt County, and the same were in the possession of

the officer levying it; and he filed as exhibits the affidavit and order for the attachment. And further charging that the defendant was indebted to him in the sum of two hundred and thirty dollars for a lot of rope which plaintiff furnished to said defendant to be used by him in securing the timber, ties and logs, in Hughes river, one coil of which rope said defendant used, and one coil was delivered by plaintiff at the barn of Col. Enoch, near Greenville, and defendant notified that said rope was there subject to his orders upon payment of the costs thereof, and that said defendant had failed to pay for said rope, and that the plaintiff was justly entitled to recover the value thereof; and charging that he was justly entitled to recover from the defendant, for catching and securing the railroad ties, the sum of five hundred and seventy dollars, and for the rope furnished to the said defendant the sum of two hundred and thirty dollars, making in all the sum of eight hundred dollars; that he was remediless in the premises, save in a court of equity, where matters of the kind are properly cognizable; and prayed that he might have a decree against the defendant for the sum of eight hundred dollars, and for the sale of said cross-ties attached in the counties of Wood and Wirt, and out of the proceeds that the costs might be paid, and expenses of levying upon and attaching said cross-ties, and preserving the same in the hands of the sheriff, and for the payment of his claim and interest, and for general relief.

Defendant filed a general demurrer to the bill, and, without waiving his demurrer, filed his answer, denying that the Hughes river is any part of the Little Kanawha river, and averring that it is a separate and distinct river, and so recognized in the history and geographical surveys and delineations on the maps of the State of West Virginia, *etc.*; and admitting the truth of the allegation that in the fall of 1892 and spring of 1893 there was no boom in use for the catching of timber drifting in said Hughes river below the point where the plaintiff retained the respondent's railroad ties in said Hughes river; and charging that no boom could be maintained in said Hughes river during the years 1892 and 1893, at any point in said Hughes river, or in said Little Kanawha river, because the same was not allowed by the laws of the State of West Virginia; and

denying that the plaintiff was or could be the owner of any boom near the mouth of Hughes river, in Wirt County, W. Va., for catching timber and railroad ties which might be drifting in said Hughes river; and denying that plaintiff caught in any boom any railroad cross-ties belonging to respondent, and drifting in said Hughes river, near the mouth of the Little Kanawha or elsewhere; and denying that the plaintiff had any right to catch, in any boom in said Hughes river, any cross-ties or timber or property, belonging to respondent, drifting in said Hughes river, at any point, in any boom; and denying that plaintiff was entitled to receive from him anything for illegally obstructing the floating and passage of any of his railroad cross-ties or timber down said Hughes river; and especially denying that the plaintiff was entitled to receive or recover from respondent six cents for each and every tie caught and preserved by him in any such boom that may have been so attempted to have been maintained by plaintiff in Hughes river illegally; and charging that plaintiff did not preserve respondent's ties, but threw the same out of the boom when found by the plaintiff; and denying that he was indebted to the plaintiff in any such sum as two hundred and thirty dollars for rope furnished to respondent by plaintiff, but that it is true that respondent did receive and use one coil of rope, worth, including freight seventy-seven dollars; and denying that there was any coil "delivered by plaintiff at the barn of Col. Enoch, near Greenville," or, at least, if it was placed there, it was not delivered to respondent; and denying that respondent was notified that said rope was there subject to his order, upon payment of the costs thereof, and denying any liability to pay for any rope so delivered at Col. Enoch's, or that plaintiff was entitled to recover anything on account of same against him; alleging that, in the spring of 1893, respondent and Miller were running and drifting cross-ties in said Hughes river, and plaintiff proposed to respondent that he (plaintiff) would get a lot of rope, and put some rafts across the Little Kanawha below the mouth of Hughes river, to catch plaintiff's and respondent's property jointly, as it should come out of Hughes river; that at the time said river had been lately frozen over, and the ice had broken up, and the object was to hold the ice and the stuff that was in it; that,

in addition to plaintiff and respondent, the Parkersburg Mill Company and William Richardson, all of whom had property, or were interested in property, that floated in said Hughes river, or bound up in said ice, were to bear their share of the expense of putting in three rafts; that to such proposition respondent acceded, but that plaintiff failed to and did not put in such rafts, and did not stop any such property of respondent, and then afterwards set up claim that respondent should pay for the coil of rope which plaintiff had gotten, but not used, but respondent had nothing to do with getting such rope, and denied that he was in any way liable to pay anything therefor; and averring that, by reason of the failure of the plaintiff to place and secure such rafts across said Little Kanawha river, respondent lost railroad ties that floated out with the ice into the Little Kanawha and Ohio rivers to a large amount, at least the sum of five thousand dollars, which sum of five thousand dollars respondent had a right to and claims, and also seeks and asks to recoup and have set off against the plaintiff's claim set up in said bill for said rope as well as for catching said cross-ties; and averring that the seventy-seven dollars had been settled and adjusted and by accord satisfied prior to the institution of this suit; denying that plaintiff was justly entitled to recover from defendant for catching and securing said railroad ties the sum of five hundred and seventy dollars, and for the rope furnished the sum of two hundred and thirty dollars, making in all the sum eight hundred dollars, as charged in said bill, or that he was indebted to the plaintiff in any sum whatever, but charging that, upon a just and fair settlement, plaintiff was indebted to respondent, because that about the 29th of April, 1893, respondent caught twenty-five hundred railroad crossties drifting in Hughes river belonging to plaintiff, and secured same, and cared for and preserved them, and delivered them to plaintiff, for which respondent was entitled to recover a fair and reasonable compensation, as provided by law; that he preserved and cared for same from about April 29 to about July 1, 1893, and that a reasonable compensation therefore should be fixed and ascertained by the court; and further charging that, during the fall of 1892 and spring of 1893, the plaintiff undertook to establish a boom in said Hughes river, as he calls it, and went on and

placed obstructions in said river, and kept the same there during the fall of 1892, and up to the time of the bringing of this suit and the filing of the answer; that said Hughes river, at the point where the plaintiff was attempting to maintain said boom and obstruction, was and is a navigable river and stream, and was and is used a great deal then and now by the citizens of West Virginia, and people and public doing timber business thereon, for the transportation, floating, driving, drifting of timber, cross-ties, *etc.*, along and upon the waters of said Hughes river, as they had a right then and now to do without hindrance; that at the point where said boom was so established, and for at least a distance of about a mile above that in said Hughes river, the said river is and was then navigable for steamboats and other crafts, rafts, *etc.*, at all times when said Little Kanawha is and was navigable for such crafts, rafts, boats, *etc.*, and at all times except during ordinary low water; that said obstruction so called a "boom" by said plaintiff, was then and is now without any legal authority or right whatsoever, and is in violation of law and the rights of this respondent, and of the citizens of the United States, of the public in general, and especially of the citizens of the State of West Virginia, and then and now constituted a nuisance under the law; and said boom was by plaintiff so constructed that there was no provision for timber, cross-ties, or property of respondent or anybody else to pass through or beyond said obstruction or boom so placed there by plaintiff, and in consequence it detained the cross-ties and property of this respondent to a large amount; that respondent, through his agents and employes, went and took possession of his cross-ties so wrongfully detained by plaintiff, and loaded them into barges, and about the month of June, and just prior to the institution of this suit, moved the barges into which respondent's said cross-ties were so loaded; that plaintiff took out an attachment against respondent before H. J. Fought, justice of the peace of Wirt County, claiming and swearing that he was entitled to recover from respondent three hundred dollars, but, before the same could be tried, plaintiff dismissed that action, and then brought this suit, and swore he was entitled to recover eight hundred dollars, and denying the plaintiff's right to recover anything, or his right to issue

any writ of attachment; that respondent has given bond and taken possession of his property, and is entitled to recover from the plaintiff a reasonable compensation for catching, securing, preserving, and delivering to plaintiff said twenty-five hundred ties, and to decree, therefor, together with his costs in this suit, and praying for affirmative and for general relief; to which answer plaintiff replied generally.

On the 29th of August, 1895, the cause was heard upon process executed, affidavit and attachment issued and levied, upon the bill filed, and proceedings had at rules, the demurrer and answer of defendant, general replication to the answer, the issue on demurrer, and the depositions of all the witnesses, taken both for plaintiff and defendant; whereupon the court overruled the demurrer, and found that the plaintiff was entitled to a reasonable compensation for catching and preserving defendant's ties, and sustained the attachment issued in the cause, but held that, before a final decree could be executed in the cause, it should be referred to one of the commissioners of the court to take, state, and report an account between the plaintiff and defendant. The cause was accordingly referred to W. W. Jackson, commissioner, with directions, after first giving reasonable notice to the parties, to make, state, and report an account between plaintiff and defendant, as follows: "First, as to the amount the defendant is indebted to the plaintiff on account of the lines or ropes mentioned in the bill, alleged to have been purchased by the plaintiff for the use of the defendant, the plaintiff and the Parkersburg Mill Company, if any, the costs of said ropes, and the amount to be charged to the defendant; second, the number of railroad ties, belonging to the defendant, collected in plaintiff's boom and received by the defendant, and what would be a just compensation for catching and preserving said railroad ties, and the amount to which the plaintiff would be entitled for such service; third, the amount of payments or offsets to which the defendant may be entitled, under the pleadings in this cause, if any."

On the 19th of November, 1895, Commissioner Jackson filed his report in the cause, in substance as follows: "Your commissioner reports that the evidence submitted to him by plaintiff and defendant was very conflicting, and that a

large amount of such evidence was irrelevant, and totally foreign to the matters under consideration. Your commissioner reports that no evidence was produced before him except the depositions already filed in the case." In response to the first inquiry, he says: "Your commissioner finds that the defendant is indebted to the plaintiff on account of the lines or ropes mentioned in the bill, alleged to have been purchased by the plaintiff for the use of the defendant, in the sum of \$230. Your commissioner has been unable to report exactly the cost of the ropes purchased for the use of the defendant, the plaintiff and the Parkersburg Mill Company, but, on the testimony of S. L. Gould, fixes the cost price of said ropes at \$797.80. Of this rope the mill company took two-fifths, leaving the remaining three-fifths to be divided equally, as ascertained by the commissioner, between the plaintiff and the defendant, both plaintiff and defendant being liable for the payment of one-half of said three-fifths part set aside to them. While this would exceed the amount claimed in the plaintiff's bill, owing to the uncertainty of the evidence, your commissioner has taken the amount as set out in the plaintiff's bill, and fixed the liability of the defendant to the plaintiff on account of said ropes as \$230." And to the second inquiry: "As to the number of railroad ties belonging to the defendant collected in plaintiff's boom and received by the defendant, the testimony is extremely conflicting, and the witnesses, all with the exception of the defendant, give estimates in guesses as to the amount, no person seeming to have actually counted the number of ties so collected. The defendant testifies that there were 6,700 ties in the boom, and that prior to that rise he had loaded 3,000 ties out of Miller's boom, making 9,700 in all. Your commissioner finds that the amount of ties claimed in the plaintiff's bill to have been caught for the defendant was 9,500. Your commissioner, therefore, fixes the number of ties collected in the plaintiff's boom, and received by the defendant, at 9,500. Upon the question of a just compensation for catching and preserving said railroad ties, and the amount to which the plaintiff would be entitled for such services, your commissioner reports that the evidence varies from one-half a cent to six cents a tie, but that the amount of six cents per tie seems, from the evidence, to

have been paid almost if not exclusively upon the Little Kanawha river, the evidence showing that the amount paid upon the Hughes river, when caught in booms, ranged from one-half a cent to three cents. Your commissioner, after carefully considering the evidence, has reached the conclusion that a just compensation for catching and preserving said railroad ties would be two and a half cents for each tie, making a total of \$237 due from the defendant to the plaintiff on account of catching and preserving said railroad ties." And to the third inquiry, he says: "Under this head your commissioner reports that, after a careful consideration of the evidence, he is of the opinion that the defendant is entitled to no set-off or payment against the plaintiff's claim." "Your commissioner further reports that there is due as ascertained by him, from the defendant, John A. Hare, to the plaintiff, D. M. Miller, on account of rope, \$230; on account of compensation for catching and preserving ties, \$237.50,—making a total of \$467.50 due from the defendant to the plaintiff."

The defendant, John A. Hare, excepted to the report: "First, because the same is not supported by the evidence before the commissioner and before the court; second, because said report is contrary to the evidence in the cause before said commissioner; third, because the commissioner has erred in allowing the plaintiff, D. M. Miller, \$230 for rope, when the evidence shows that no rope was ever delivered to the defendant, nor was any ever delivered at any place agreed upon between the plaintiff and defendant for delivery; fourth, because the commissioner erred in allowing the plaintiff two and a half cents ($2\frac{1}{2}$) per tie as just compensation for catching and preserving railroad ties in controversy, making a total of \$270.50 due from the defendant to the plaintiff on account of catching and preserving such railroad ties, and because plaintiff is not entitled to recover anything, as set up in the answer filed in this cause, and said finding is contrary to the weight of evidence; and, fifth, because of errors and insufficiencies appearing upon the face of said report."

And on the 2d of December, 1895, the cause was heard upon the papers formerly read, and the orders made therein, upon the order of reference and report of Commissioner Jackson made thereunder, and the exceptions

taken by defendant to said report, and the exceptions set down for argument, and was argued by counsel; whereupon the court overruled the several exceptions of the said defendant to said report, and confirmed the report of Commissioner Jackson, and decreed that plaintiff recover from defendant, John A. Hare, four hundred and seventy-two dollars and twenty-seven cents, the amount ascertained by the commissioner to be due from defendant to plaintiff, with interest from September 13, 1895, until paid, and the costs of suit, from which decree this appeal is taken.

The first assignment of error is the overruling of the demurrer to plaintiff's bill. The demurrer filed is a general demurrer to the whole bill, and sets out no grounds other than that "the same is not sufficient in law." The bill alleges indebtedness of the defendant to the plaintiff in the sum of two hundred and thirty dollars for rope sold by plaintiff to defendant and furnished to him, and also in the sum of five hundred and seventy dollars for catching and preserving certain ties of and for the defendant. In his brief the counsel for defendant argues that the demurrer should have been sustained by reason of the plain and willful violation of the statute law of the State of West Virginia in maintaining a boom on a navigable stream by the plaintiff, where no such boom was permitted under the law, in which boom defendant's ties were unlawfully caught, and for which plaintiff has charged defendant, and seeks to recover from him such charges in this suit. The reasons assigned for sustaining the demurrer do not apply to the whole bill. The demurrer is too extensive, and was properly overruled.

Second, that the court erred in overruling the exceptions to the report of Commissioner W. W. Jackson in the cause, certified as of September 28, 1895, because the same is not supported by the evidence before the commissioner and before the court, and for other reasons set forth in the exceptions to said report filed by John A. Hare, by his attorney, L. N. Tavener. A careful examination of the evidence shows that the third exception to Commissioner Jackson's report is well taken, as to the allowance to plaintiff, Miller, of two hundred and thirty dollars for rope. This allowance should have been seventy-seven dollars, and not two hundred and thirty dollars. Defend-

ant admits getting the half coil of rope at seventy-seven dollars, and the fact is proven also by other witnesses. It is true, it is shown by the testimony of B. S. Pope that the seventy-seven dollars was credited to plaintiff, Miller, in his account with Pope & Sons, and charged to defendant, Hare; but it is also shown by the testimony of B. S. Pope that it was again credited back to Hare, and charged back to Miller, so that Hare has never paid it. The evidence fails to prove that defendant, Hare, ever purchased, or contracted to purchase or received, or agreed to receive, any more of the rope than the half coil, for which he says himself he should pay to Miller seventy-seven dollars. There was considerable testimony taken concerning the purchase of the rope, and of interviews between plaintiff, Miller, and Hare, and between Miller and Pope, and representatives of the Parkersburg Mill Company, about its purchase. Miller says he and Hare were consulting about the matter of getting the line to hold the gorge, ice, timber, and ties, and save the stuff, when Hare said, "Let's go up and see Pope, and see what he thinks of it, and, if he is in favor of it, we will do so;" that they went to Pope's office, in the city of Parkersburg, "and there consulted about the matter between us three, and the agreement was made there to order ten coils—half coils—of two-inch line, and take them there, and if it was a favorable thaw, and we thought it could be held by erecting a boom below it, and putting them out, why we were to do it, each one paying for one-third of the line,—the Parkersburg Mill Co., one-third; myself, one-third; and John A. Hare, one-third." Hare in his testimony says emphatically there was no such contract, and he is corroborated by the testimony of Pope, who was the third party present when the contract was alleged to have been made.

Third assignment: "The court erred in confirming the said commissioner's report, and decreeing against the appellant, John A. Hare, the sum of \$472.27, with interest and costs of suit." This is correct to the extent of the difference between two hundred and thirty dollars allowed in the report for rope, and seventy-seven dollars, the amount which should have been allowed.

Fourth assignment: "The court erred in not dismissing the plaintiff's bill after the proofs were in, showing that

the plaintiff, D. M. Miller, had in his own wrong erected a boom across Hughes river, which was a navigable stream, and then being navigated by steamboats plying the waters of the Little Kanawha river; thereby not only obstructing navigation, but preventing, by his wrongful and illegal act, the ties and timber of the appellant from passing out of said stream into the Little Kanawha river, and at the same time obstructing and hindering navigation of said river, and preventing its free use by the public." A careful review of all the testimony shows that plaintiff, Miller, maintained a boom in Hughes river from one hundred to two hundred yards from its mouth, and that defendant, Hare, had a boom about a mile to a mile and a half above Miller's, on the same river. These booms were both constructed and maintained for the purpose of catching ties, timber, *etc.*, to keep it from passing out into the Little Kanawha river, and thence into the Ohio; that there was no boom below that of plaintiff, Miller, to prevent free passage of any ties, timber, *etc.*, which passed his boom, into the Little Kanawha river; that ties, *etc.*, passing into the Little Kanawha, were liable to be lost entirely to the owners, and, if caught on the Little Kanawha or Ohio river, the expense of recovering the same was much greater than if caught in the said booms.

Defendant, Hare, in his testimony, says that "in January, 1893, the river broke up, and the ice destroyed Mr. Miller's shear boom, and a portion of my side boom, and I took my shear boom and what side boom I had and coupled it onto his [Miller's], and we used the boom jointly for a short time for catching our ties"; that Mr. Miller rebuilt his shear boom, and witness Hare then moved his back to the place where he formerly had it; as he expressed it; "that is, what I had left of it," "about a mile, or a mile and a half, or something like that, above Mr. Miller's." The "wild rise," as witness Hare designated it, came in April, 1893, when plaintiff caught most of the ties of defendant, Hare, for which he has charged him in this suit. From Hare's testimony it appears that several thousand ties on this rise passed out into the Little Kanawha river, and Hare himself says that his recollection is that it cost eleven cents per tie to have such ties gathered up and delivered in boat. Several witnesses were exam-

ined as to the cost and proper amount to be paid for catching the ties, and it ranges all the way from one-half cent per tie to six cents. William Richardson testifies very intelligently, and from large experience in the business, and he fixes a reasonable compensation at three cents per tie for catching and preserving defendant's ties as was done by plaintiff. So I conclude that the amount arrived at by the commissioner, to-wit, two and one-half cents per tie, was not unreasonable. And Hare admits that plaintiff caught and saved to him about nine thousand seven hundred ties. The evidence further shows that the catching of plaintiff's ties by defendant in his boom above plaintiff's boom was of no advantage to plaintiff, but a disadvantage, and that defendant, as well as his agents and employes, was notified by plaintiff not to catch his ties. After acquiescing, and even assisting, as defendant did, in the maintenance of plaintiff's boom, and receiving the benefits thereof in the saving of large numbers of his ties, at an expense far less than it must have cost to save them if they had been permitted to pass out of Hughes river into the Little Kanawha, he cannot, in a court of equity, be heard to say that the boom was constructed and maintained in violation of law, and that the same was a public nuisance, interfering with steamboat navigation, and therefore he should not be required to pay a just and reasonable compensation for a valuable service rendered him. It is shown by the evidence that the boom of plaintiff was not a private nuisance, but of great value and benefit to individuals, engaged in driving and running ties, timber, *etc.*, in Hughes river, and that it was specially so to defendant, Hare. In *Page v. Lumber Co.*, 58 Minn. 499. (55 N. W. 608, 1119), cited by appellant, the court says "that a nuisance, such as an unreasonable or wanton destruction of a navigable stream, or a public highway, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom distinct and apart from the common injury. * * * The public wrong inflicted upon all persons must be redressed by a public prosecution." If appellee's boom was erected and maintained, as claimed by appellant, in violation of law, and was therefore a public nuisance, the way to get rid of

it was by a public prosecution, and appellant, Hare, had no cause of complaint as an individual, aside from that of the common public, unless he "suffered a special and peculiar damage therefrom distinct and apart from the common injury." *Aldrich v. Wetmore*, 52 Minn. 164, (53 N. W. 1072); *Williams' Case*, 5 Coke, 72a; *Brakken v. Railway Co.*, 29 Minn. 41, (11 N. W. 124). Not only is this not appellant's case, but it is shown that the boom was of peculiar benefit to him, not only saving him large expense, but from considerable probable loss. The appellant's ties were drifting on the Hughes river, and were secured by appellee, and taken from his possession by appellant without having paid the just compensation for catching and preserving the same, as provided in section 7, chapter 61, Code, to the person taking them up. Appellee is entitled to recover the same in this suit.

The decree is affirmed as to the amount allowed for catching and preserving the ties, and is reversed as to amount found for rope, which should be seventy-seven dollars; and, this Court proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered and decreed that plaintiff recover against the defendant the sum of three hundred and seventeen dollars and thirty cents, with legal interest thereon from December 2, 1895, until paid, and his costs by him expended about his suit in the circuit court, including fifteen dollars as allowed by law, and that he have execution therefor.

Reversed in part and decree entered.

CHARLESTON.

SNYDER v. WHEELING ELECTRICAL CO.

Submitted June 3, 1897—Decided November 10, 1897.

1. PLEADING—*Negligence—Evidence.*

A declaration for tort arising from negligence may allege the mere negligence generally, without stating the particular facts going to prove negligence, but must specify with reason-

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43	661
64	84

43	661
666	419
66	466

able certainty the main or primary act of omission or commission doing the damage; and the allegation that the defendant did the particular act causing the damage furnishes the predicate or basis for evidence of all such incidental facts and circumstances of omission and commission as fairly tend to establish the negligence of the primary act, and to plead them specially would be to plead mere evidence instead of facts. (p. 662)

2. PLEADING—*Negligence—Evidence—Variance.*

Where a declaration based on negligence states a particular act as the cause of the damage, no evidence of other acts causing it can be given. (p. 665.)

3. NEGLIGENCE—*Evidence.*

There must be reasonable evidence of negligence. But where a thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. (p. 667.)

Error to Circuit Court, Ohio County.

Action by Florence Snyder against the Wheeling Electrical Company. Judgment for plaintiff. Defendant brings error.

Reversed.

W. P. HUBBARD, for plaintiff in error.

JOHN A. HOWARD and MELVILLE D. POST, for defendant in error.

BRANNON, JUDGE:

In an action on the case, Florence Snyder, administratrix of Andrew C. Snyder, recovered a judgment against the Wheeling Electrical Company for one thousand dollars, and the company obtained this writ of error.

One error alleged is the action of the circuit court in overruling a demurrer to the declaration. The specification of its defect is that it ought to, but does not, set forth the duty and aver the neglect; and citation is made of the language in the opinion in *Clarke v. Railroad Co.*, 39 W. Va. 732 (20 S. E. 696), that a declaration in "tort must have requisite definiteness to inform the defendant of the nature of the cause of action, and the particular act or omission constituting the tort," and reference is made to

Poling v. Railroad Co., 38 W. Va. 645 (18 S. E. 782), holding that a declaration for negligence "is good if it contain the substantial elements of a cause of action, the duty violated, the breach thereof properly averred, with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the very right of the case can be given." I think these statements are good law. Hogg, Pl. & Forms, § 140, says that it is settled as a general rule that it is not necessary to state the particular acts which constitute negligence. This is so, but we must take care not to misapply this statement. The West Virginia cases cited to sustain the rule are cases against railroads for killing stock. If a declaration allege that a railroad killed stock by negligently running a train over it, as in those cases, that would be sufficient, without more details of the circumstances of running over it; but I take it that it would not be enough simply to say that the company negligently killed a horse. You must aver the duty, and aver the existence or presence of negligence in its performance, and specify the act working damage, but need not detail all the evidential facts of negligence. You must tell the defendant, even under this general rule, that he negligently did a specific act doing harm. In other words, you may say that the defendant negligently did or did not do so and so, without detail as to the mere negligence, but you must state the acts that are the basis of liability. If the negligence can not be otherwise charged, detail must be given. As said in *Berns v. Coal Co.*, 27 W. Va. 285, the object of a declaration is to give the facts constituting the cause of action, so they may be understood by the party who is to answer them, and by the jury and court, who are to give verdict and judgment on them: and though, in an action for negligence, it is not necessary to state with particularity the acts of omission or commission, yet, lest too loose a practice shall grow under this rule, it may be well to state the warning given in *Railroad Co. v. Whittington*, 30 Grat. 810, that "this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof." In that case it was held not enough to state that the railroad company was working its road with cars and conducted itself so negligently in its business that it inflicted

severe bodily injuries, by reason of which the person died, without stating where the deceased was, or how injured. To avoid misunderstanding, it is important to add that the declaration need not state the particular facts that are not primary or main facts, but only are evidence of primary facts. When the necessary primary facts are given, then all other facts merely incidental that go to prove the primary facts may be proven without specification in the declaration. *Davis v. Guarnieri*, 45 Ohio St. 470 (15 S. E. 350); *Ware v. Gay*, 11 Pick. 106; *McCauley v. Davidson*, 10 Minn. 418 (Gil. 335) 422.

The declaration in this case states that the defendant operated an electric plant for the manufacture and sale of electricity, and had its wires over the streets of the city of Wheeling for the conveyance of electricity in dangerous currents, and that it was the duty of the defendant to exercise all possible care in putting up and operating its plant and wires, and constantly inspecting the wires and other appurtenances and appliances, and in seeing that they were strong, suitable, and safe, and that the wires and appurtenances were at all times safely secured, and to immediately attend to and repair broken or defective wires and appliances, and, when any of the wires were down upon the street, to cut off from them the current of electricity, that the lives and limbs of persons on the streets might not be endangered; yet the defendant carelessly and negligently suffered one of its wires at the corner of Market and Sixteenth streets to be so insufficiently secured that it came down, and lay on the street, and Snyder stepped upon it, received the electric current, fell prostrated by it, and continued to lie there, and receive the current into his body, and therefrom died. This declaration surely says that it was the duty of the defendant to safely secure the wires, and that, from being insufficiently secured, they came down into the street, and there wrought the injury. This one duty, breach, and injury save the declaration from demurrer. I think, too, the declaration may, by implication, be construed to say, what it should have positively averred, that the defendant failed to cut off the current from the wire when down, as it avers that the current entered Snyder's body, and he fell, and continued to receive it, which could not be so had the current been cut

off. "A declaration will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment." Hogg, Pl. & Forms, § 140. Those were the only two omission of duty specified. None other could be proven, for, even where there may be allowable a general charge of negligence, yet, if the declaration does give certain specifications of negligence as sources of the injury, others cannot be proven. *Hawker v. Railroad Co.*, 15 W. Va. 629. Therefore evidence was not admissible to prove want of or bad insulation of wires at the place of accident and elsewhere, and that wires came in contact with wet posts, and that nobody was kept on duty to repair broken wires; that on a certain other occasion, when a wire was out of fix, some one telephoned from the plant that there was no one to fix the wires; that no instruments were kept to discover breaks; and that at other places the wires were bare. It might seem that some of this evidence might come in under the allegation of insecure fastening, but it relates more to the condition of the wires, not to their fastening, and there is no allegation of defective wires.

The declaration does assign certain duties as imposed on the company, among them the duty to attend to broken wires, and to inspect wires and apparatus, and to see that all wires were strong, suitable, and safe; and, if this recital of duties had been followed up with averment that the insulation of the wires was defective, and in places the wires bare, coming in contact with wet poles, thus injuring and rendering them unsafe and liable to break, or even the general allegation that the wires were unsuitable, weak, and unsafe, in negation of the duty assigned in the recital, and that servants were not kept for inspection, and that careful repair was not made, and that no appliances were kept to announce at the plant a fall of wires, and no means existed for discovery of their fall, this evidence would have been admissible. But what, in this declaration, gave the defendant warning of all this evidence? I think evidence of failure to inspect was admissible as evidence of insecurity of fastening and on principles above stated. It may be said that the evidence that no instrument was kept to tell of a fallen wire ought to come in under the allegation that it was the duty to cut off the current, and

that the current continued to flow after the fall of the wire; but that would be going very far. None of this evidence could get in under this declaration but by a liberality too loose,—one ignoring the defendant's rights,—some of it not at all. I here allow the evidence that with certain means of ascertaining an accident the current could be shut off at once, under the charge that it was the duty to shut it off, and the allegation made by implication that it continued after the fall of the wire; and that is going pretty far. All this evidence, as a court can readily see, was calculated to and did wield a potent effect in the case, and the error of its admission cannot be looked over as harmless. It was an important factor in the trial.

From these considerations it comes that plaintiff's instruction No. 2 was bad as presenting a theory for recovery which, though made relevant by some evidence, yet there was no warrant for under the declaration. It said that if the defendant failed to have the most reliable and best appliances to discover broken wires, the company, in the absence of contributory negligence, was liable. I think No. 3 good under the charge of insecure fastening. I think No. 2 should have said "good, reliable and efficient" means and appliances, instead of "best and most reliable." *Berns v. Coal Co.*, 27 W. Va. 286, points 9, 10. An instruction for defendants (No. 4) told the jury that the only negligence charged in the declaration was in suffering wires to be so insufficiently secured as to fall, and therefore all evidence and argument as to other suggestions of negligence must be disregarded; yet plaintiff's instructions held the company liable for not only that, but for failure to have the best appliances for discovery of broken wires, and for failure to exercise the highest degree of care in the construction, inspection, and repair of wires and poles; and so the instructions were inconsistent,—one saying to the jury that the case involved only one basis of recovery, others giving several. Which would the jury follow? Likely those giving several. A good instruction does not cure a bad one, but it must be withdrawn. *McKelvey v. Railway Co.*, 35 W. Va. 500 (14 S. E. 261). Inconsistency in instructions is error. *Industrial Co. v. Schultz*, 43 W. Va. 470 (27 S. E. 255).

I think, as Dr. Walden had examined the dead body

of Snyder in his effort to resuscitate life, he could give his opinion as to the cause of his death. His opinion, however, should be confined to his knowledge based on that examination; but the court allowed him to state his opinion, not only on that, but also from what he could learn,—that is, hearsay. I think it is admissible to ask him whether there was any indication of death from any other cause than electricity, so as to negative any other death-producing cause.

I come next to an important question. Suppose there is no evidence of negligence on the part of the defendant, does the mere fact that the wire fell create a *prima facie* presumption of negligence, sufficient, in the absence of something appearing in the case to repel that presumption, to support the action? This involves the rule or principle of *res ipsa loquitur*,—the thing itself speaks. A wire charged with a deadly current of electricity falls from its proper place of elevation above the street to the surface of the street, and there, by contact with a man lawfully passing along the highway, kills him with its current. Are we to presume that its fall came from some negligence of the owner, unless the circumstances of the case or facts shown by him shall show that its fall is not attributable to his negligence, but from some defect which that reasonable care and prudence proper in the case of such deadly wire was unable to discover, or some accident beyond his control; in other words, from inevitable accident? I answer that the law raises a *prima facie* case of negligence. As stated in that great work, 16 Am. & Eng. Enc. Law, p. 448: "As a rule, negligence is not presumed. But there are cases where the maxim, '*Res ipsa loquitur*,' is directly applicable, and from the thing done or omitted negligence or care is presumed." The rule cannot be better stated, in its generality, than as given in *Scott v. Dock Co.*, (1865) 3 Hurl. & C. 596: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." In those words it is approved in 1895 in *Shafer*

v. Lacock, 168 Pa. St. 497, (32 Atl. 44), a case where two workmen were repairing a roof, having a fire pot, and from it a fire resulted, destroying the house. "When the physical facts of an accident themselves create a reasonable probability that it resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence of negligence in conformity with the maxim, '*Res ipsa loquitur*,'" is the apt language in which the principle is stated in *Seybott v. Railroad Co.*, 95 N. Y. 562. One man is hurt from the works or property of another, when, from the nature of the case, he would not likely have been hurt without negligence of that other. May he not ask of that other an explanation, or, on his failure to give it, then damages for his injury? Take the case where one, in passing along a street, is hurt by a barrel falling from a door above, or by a brick falling from a wall or scaffold, or by a falling shutter or wall, or the like. The mere occurrences in themselves import negligence. Especially take the cases where things of great danger are used in public highways, where multitudes constantly and lawfully pass, their very nature requiring the highest degree and constancy of care, and one is killed from its being out of place or defective, why may we not logically and fairly assume negligence, unless other plausible explanation appears? The latest work on Torts (2 Jagg. Torts, p. 864) says: "A live wire, however, is exceedingly dangerous, so that proof of contact therewith, and consequent damages, makes it a complete case of *prima facie* negligence, and throws the burden on the defendant to show that such wire was in the street without fault on his part. Generally, companies using electricity on lines along a street are charged with the highest degree of care, having due reference to existing knowledge in the construction, inspection, and repair of their wires and poles, and in the use of devices to guard against harm." This doctrine needs no further discussion from me. It is well sustained by American and English authority. 16. Am. & Eng. Enc. Law, 449, and notes: 2 Jagg. Torts, 938; Whart. Neg. § 421; Cooley, Torts, 799; Bigelow Torts, 596; Shear & R. Neg. § 60; full note 6 Am. St. Rep. 530,—a building falling into street; *Mulcairns v. City of Janesville*, 67 Wis. 24, (29 N. W. 904),—wall of a cistern falling; *Dixon v.*

Pluns, 98 Cal. 384, (33 Pac. 268),—chisel falling from a scaffold; *Houston v. Brush*, 66 Vt. 331, (29 Atl. 380)—injury from being struck by a wheel from a tackle block, attached to a derrick; note in *Railroad Co. v. Anderson*, (Md.) 20 Am. St. Rep. p. 493 (s. c. 20 Atl. 2); *Thomas v. Telegraph Co.*, 100 Mass. 156,—telegraph wire swinging over a street too low, so as to obstruct travel; *Clare v. Bank*, 1 Sweeney, 539,—injury from plank falling from one's premises; *Howser v. Railroad Co.* (Md.) 30 Atl. 906,—cross-tie falling from a moving car; *Ugla v. Railway Co.* (Mass.) 35 N. E. 1126; *Morris v. Strobel & Wilken Co.*, 81 Hun. 1 (30 N. Y. Supp. 571),—sign board falling in street. It is clear that this doctrine applies in cases where a passenger on a railroad, or other conveyance of a common carrier, is injured, there existing in such cases a presumption of negligence against the carrier, because there is an implied contract to safely convey; but it is not confined to such cases. 20 Am. St. Rep. 493; *Rose v. Transportation Co.*, 11 Fed. 438. There it is said that, though the presumption is more frequently applied in such cases, yet there is no foundation in authority or reason for such limitation, as the presumption originates from the nature of the act, not from the relation of the parties, and is indulged whenever, as a legitimate inference, the occurrence is such as, in the ordinary course of things, does not take place when the proper care is exercised. This doctrine has been applied to those using electricity in streets. *W. U. Tel. Co. v. State* (Md.) 33 Atl. 763; *Haynes v. Gas Co.*, (N. C.) 19 S. E. 344. Public policy, from sheer necessity, must require of a person or corporation using the current of electricity in high tension along highways a very high, if not the highest, degree of care, and this high degree would seem all the more reasonable to justify this rule of presumptive negligence in such cases. The degree of care in the nature of the case being high, and there being little danger if such care be exercised, if accident happen, there is afforded a probability of the absence of that care. This high degree of care is exacted of operators of electricity by the cases just cited, and by *Electric Co. v. Simpson*, 21 Col. 371 (41 Pac. 499); *Giraudi v. Improvement Co.*, 107 Cal. 120 (40 Pac. 108); *Ennis v. Gray*, 87 Hun. 355 (34 N.

Y. Supp. 379). Crossw. Electricity, § 249, says that the mere fact that an electric wire sags or falls, if unexplained, is sufficient proof *prima facie* of negligence. But juries must understand that this presumption is by no means final or conclusive. Uniformly careful, prudent management commensurate with the dangerous character of the works and adequate to the safety of the public, in the absence of specific neglect connected with the accident, will repel such presumption. We must not forget that misfortunes do occur from inevitable accident. A wire may have some defect which the most astute care will not discern. A wire originally good may come to be defective, and break, when no human skill could detect its defect. Time and wear deteriorate man and all the means and instruments he uses to gain a living. Paralysis and failure may come upon them at any moment. Whether there is culpable blame is a question for a fair-minded jury under all the circumstances.

It follows from what I have said that the court properly refused to exclude the plaintiff's evidence as it tended in an appreciable degree to sustain the case, so as to make it proper to go to a jury. So I may say as to the defense of contributory negligence. *Carrico v. Railway Co.*, 35 W. Va. 389, point 3, (14 S. E. 12); *Yeager v. City of Bluefield*, 40 W. Va. 484, (21 S. E. 752). And the defense waived the motion to exclude by going on with its evidence. *Robinson v. Welty*, 40 W. Va. 385, (22 S. E. 73). *Core v. Railroad Co.*, 38 W. Va. 456, (18 S. E. 596). And it follows from the views above given that the court did not err in refusing to give defendant's instruction No. 2, that the mere fact that Snyder was injured raised no presumption of negligence against the defendant. In an instruction given in lieu of it the jury was told that the mere fact of injury raised no presumption of negligence, unless the proof establishing the injury showed circumstances from which some negligence or want of care may be attributed to the defendant. This was error against plaintiff, because it negatived the rule that the fall of the wire and injury afforded a *prima facie* case of negligence and the instruction was beneficial to the defendant.

Defendant asked instruction 9, saying that, if the wire where the accident occurred was defective, and the injury

resulted from that defect, that raised no presumption of negligence, and the plaintiff could not recover unless he proved by a preponderance of evidence, in addition to these facts, that the defect occurred through the negligent act or default of the defendant. This instruction is bad. Granting a defect in the wire killing the deceased, a *prima facie* case for recovery is made. Defendant asked and was refused instruction No. 10: "Where an event takes place, the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences designated as purely accidental, and, there being no presumption of negligence in such cases, the party who asserts negligence cannot recover without showing enough to exclude the case from that class of accidental occurrences." In *Railway Co. v. Locke*, 112 Ind. 412, (14 N. E. 391), cited to support the instruction, it is admitted, I think, that in cases where a presumption of negligence arises, the principle of this instruction does not apply. The instruction is bad as applied to this case, in view of the rule above stated of a presumption of negligence from this occurrence. Defendant was refused instruction No. 11: "Where the circumstances of an accident indicate that it may have been unavoidable notwithstanding reasonable and proper care, the plaintiff charging negligence cannot recover without showing that the defendant has violated a duty incumbent upon it from which the injury followed in natural sequence." I think this instruction proper, in view of the defendant's evidence as to good management, and evidence by witnesses on both sides that electric wires sometimes break from causes impossible to discover. Of course, though the *prima facie* presumption of negligence from the broken wire exists, yet it is subject to be met by any and all circumstances, features, and evidence in the case tending to give the misfortune a cause not springing from the company's fault, but purely from an accident, which no reasonable human care could prevent, a hidden defect in the wire, electrolysis rendering it suddenly weak, or whatever cause. This instruction presented the question to the jury on the whole breadth and aspect of the case, whether the misfortune came from unavoidable accident; and it seems to me that, when the circumstances do indicate unavoidable accident as the

cause, it ought to be shown or appear that it was not. Why was not the defendant entitled to this instruction? I think instruction No. 12 asked by the defendant was improperly refused. *Railway Co. v. Locke*, 112 Ind. 404, (14 N. E. 391). "(12) The defendant in erecting and maintaining its wires, was only bound to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its own past experience and the experience and practice of others in similar situations, together with what is inherently probable in the condition of the wires as they relate to the conduct of its business." As the case is to be retried, I shall not discuss the merits on the evidence as to the liability or non-liability of the defendant, either with or without reference to contributory negligence, as the evidence may not be the same on a second trial, and, if not, this Court ought not to express an opinion on part of the evidence. We will therefore reverse the judgment, grant a new trial, and remand.

Reversed.

CHARLESTON.

STATE v. MUSGRAVE.

(BRANNON, JUDGE, *dissenting.*)

Submitted March 11, 1897—Decided November 10, 1897.

1. CRIMINAL LAW—*Instructions—Circumstantial Evidence.*

In a case where the evidence is entirely circumstantial, it is error in the court to instruct the jury that circumstantial evidence is often more reliable than the direct testimony of eye-witnesses, and that a verdict of guilty in such cases may rest on a surer basis than when rendered upon the testimony of eye-witnesses where memory must be relied upon, and where passions and prejudices may have influenced them, for the reason that it institutes a comparison between the two kinds of evidence mentioned, and instructs the jury as to the comparative weight of circumstantial evidence. (p. 677.)

2. CRIMINAL LAW—*Instructions—Credibility of Witnesses.*

It is error in the court to instruct the jury that, if they were of the opinion that any witness had willfully and corruptly testified to what was false, they were at liberty to re-

43	672
45	80
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45	774
45	777

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47	272

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43	672
51	701

43	672
64	638

ject all of his testimony that was not corroborated by other testimony, for the reason that said instruction was calculated to mislead the jury, and was equivalent to telling them that, where a witness had sworn falsely in one thing, the remainder of his testimony should have no weight with them unless corroborated, when they had a right to believe any portion of the testimony, whether corroborated or not, and the instruction invades the province of the jury. *Thompson's Case*, 21 W. Va. 741. (p. 677.)

3. EVIDENCE—*Opinion Evidence.*

The opinions of witnesses should never be received in evidence if all the facts can be ascertained and made intelligible to the jury, or if they are such as men in general are capable of comprehending and understanding. (p. 683.)

4. EVIDENCE—*Opinion Evidence—Province of Jury.*

The general rule is that witnesses must testify to facts, and not to opinions. They must only state facts, not draw conclusions or inferences. To do so is to invade the province of the jury. (p. 689.)

5. EXPERT TESTIMONY.

The object of all questions to experts should be to obtain their opinion as to matters of skill or science which are in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. (p. 684.)

6. EXPERT TESTIMONY—*Hypothetical Questions.*

Although an expert may have heard all the testimony in the case, he can not be asked to give his opinion, based merely upon his having heard such testimony in the case, whenever there is a conflict therein, unless the same is hypothetically propounded to him. (p. 684.)

7. EXPERT TESTIMONY—*Hypothetical Questions.*

An expert can not be asked to give his opinion on doubtful facts in the case on trial, which remain to be found by the jury, but a similar case may be hypothetically put to him, based upon the evidence in such case. (p. 688.)

8. EXPERT TESTIMONY—*Admissibility of Expert Testimony.*

Where the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled or scientific witnesses is not admissible. (p. 687.)

9. EVIDENCE—*Illegal Evidence—Reversal.*

Where illegal evidence is admitted against the objection of a party it will be presumed that it prejudiced such party, and, if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for the reversal of the judgment; but, if it clearly appear that it could not have

changed the result if it had been excluded, it will not be cause of reversing the judgment. (p. 690.)

Error to Circuit Court, Monongalia County.

Indictment against David ~~Musgrave~~ for murder. From a judgment of conviction, defendant brings error.

Reversed.

OKEY JOHNSON and GEORGE C. STURGISS, for plaintiff in error.

HENRY H. PENDLETON and T. S. RILEY, ATTORNEY GENERAL, for the State.

ENGLISH, PRESIDENT:

David Musgrave was, on the 15th day of February, 1895, indicted for the murder of his wife, Emeline Musgrave, by a grand jury of Monongalia County, and on the 26th day of June, 1895, was found guilty of the charge contained in said indictment, and the jury further found that he be punished by confinement in the penitentiary. On the 27th day of June, 1895, the prisoner moved the court to set aside the verdict of the jury, and grant him a new trial, upon the following grounds: (1) Because the verdict was contrary to the law and the evidence in the case; (2) because the court admitted on the trial improper evidence on behalf of the State; (3) because the court refused to admit proper evidence offered by the defendant; (4) because the court misdirected the jury in its instructions to them on behalf of the State, and in refusing to give an instruction asked for by the defendant; (5) because of misconduct of the jury,—which motion was, on consideration by the court, overruled, and the prisoner excepted, and thereupon the court rendered judgment upon said verdict, and sentenced the prisoner to confinement in the penitentiary for the term of his natural life, and from this judgment the prisoner applied for and obtained a writ of error and superseas. Upon this writ of error the case was heard at the January term, 1896, and the judgment of the court below was affirmed. Subsequently a petition for a rehearing of the writ of error was presented and upon consideration was allowed, and at the March special term of this Court, 1897, the case was reargued, and is now before us for considera

tion upon the reargument. During the trial various exceptions were taken to the rulings of the court upon instructions which were allowed and refused, and upon the admission of testimony to the jury, which counsel for the prisoner regarded as improper, and the entire testimony is set forth in a bill of exceptions as part of the record.

The first error assigned and relied on by the plaintiff in error is that the court erred in overruling his motion to quash the indictment. This assignment, however, does not appear to be insisted upon by counsel for the prisoner in their briefs, and, as the indictment appears to conform to the statute, we suppose the motion was made out of abundant caution.

The next assignment of error relates to the form of the oath administered by the jury. The jury was sworn to "well and truly try and true deliverance make between the State of West Virginia and David Musgrave, the prisoner at the bar, whom you shall have in charge, and a true verdict render, according to the evidence, so help you God." It is claimed that they should have been sworn "a true verdict to render according to the law and the evidence." The oath administered was exactly in accordance with the form prescribed. (Matth Cr. Law, p. 253, note); also with the form prescribed in Robinson's Old Forms, and the form used in this case is the one which has been used in felony cases, both in Virginia and in this State, for very many years, and came to us from the English practice, and we should depart with reluctance from those time-honored forms. It is true that in Arkansas the jury, being the judges as well of the law as the facts (as they have been held to be in this State), must be sworn to try the case according to both. The form of the oath, by analogy to the form used in England, being: "You shall well and truly try, and a true deliverance make, between the state of Arkansas and the prisoner at the bar whom you shall have in charge, and a true verdict give according to the law and the evidence, so help you God." *Patterson v. State*, 2 Eng. (Ark.) 59. But if we felt at liberty to make an innovation on the time-honored practice which has come down to us from England and the mother state, can we say that the prisoner was prejudiced by the fact that the jury that tried him was not sworn a true verdict

to give according to the law and the evidence? The record clearly shows that this verdict was not given upon the evidence alone, but by applying the law to the evidence. They were instructed as to the law by the court, and in the light of these instructions they found the prisoner guilty of murder in the first degree as charged in the indictment, and they further found that he be punished by confinement in the penitentiary. This they could not have done without applying the law as they understood it and received it from the court to the facts adduced in evidence before them. I do not, therefore, consider it necessary to change the form of the oath to be administered in a felony case so that they should be sworn to render a true verdict according to law and the evidence.

It is further claimed by the plaintiff in error that the court erred in giving each and everyone of the instructions given for the State, and it is insisted by counsel for the prisoner that the circuit court erred in giving instruction No. 3 asked for by the State, and objected to by the prisoner, which reads as follows: "The court instructs the jury that circumstantial evidence is legal evidence, and in most criminal cases it becomes necessary to resort to circumstantial evidence. Criminal acts are usually performed in secrecy. Evidence should not be discredited because it is circumstantial. It is often more reliable than the direct testimony of eyewitnesses, when it points irresistibly and conclusively to the commission by the accused of the crime. A verdict of guilty in such cases may rest upon a surer basis than when rendered upon the testimony of eyewitnesses whose memory must be relied upon, and whose passions and prejudices may have influenced them." It is earnestly contended by counsel for the prisoner that this instruction was erroneous for the reason that it dealt with the weight of the evidence. Now, a review of the testimony in the cause shows that the State rested its case, and asked that the prisoner be convicted entirely upon circumstantial evidence. If David Musgrave committed the deed of which he is accused in the indictment, no eye saw the act committed, and there is no direct evidence in the entire record fixing the crime upon him. Knowing that the State must rely solely upon circumstantial evidence in order to secure a conviction, the attorney for the State

asked the court to give the above instructions to the jury; and, while the instruction purports to draw a comparison between the weight of circumstantial and direct evidence, it can only relate to and be construed as applying to the evidence in the cause. The instruction was surely not asked in order that the court might have an opportunity to announce an abstract proposition; and when the court proceeds to state the effect of circumstantial evidence, and tells the jury that "evidence should not be discredited because it is circumstantial," there being evidence of no other character before the jury, we can but regard it as an instruction on the weight of the evidence. And, again, when the court tells the jury that: "Such evidence is often more reliable than the direct testimony of eyewitnesses, when it points irresistibly and conclusively to the commission by the accused of the crime; a verdict of guilty in such cases may rest upon a surer basis than when rendered upon the testimony of eyewitnesses, whose memory must be relied upon, and whose passions and prejudices may have influenced them,"—can we say otherwise than that the court, in so instructing the jury, was instructing them upon the weight and effect of the only character of evidence that was before them? The court surely, when it says that such testimony is more reliable, and that a verdict of guilty may rest upon a surer basis than when rendered upon the testimony of eyewitnesses, was speaking of the weight of the evidence.

It is further contended by counsel for the prisoner that the court erred in giving the sixth instruction on behalf of the State, which reads as follows: "The court instructs the jury that you are the judges of the weight and credibility of the witnesses who have testified in the case, and that you have a right to give such weight and credit to the testimony of a witness as in your judgment, from all the circumstances, it is entitled to. And if you are of the opinion that any witness has wilfully and corruptly testified to what is false, you are at liberty to reject all of his testimony that is not corroborated by other evidence." This question was considered and passed upon by this Court in the case of *State v. Thompson*, 21 W. Va. 741. The third instruction in that case given at the instance of the State to the jury reads as follows: "The court instructs

the jury that, if they are satisfied from the evidence of William Patterson, Esther Patterson, Harvey Patterson, Alfred Allen, Moses Hunt and Rebecca Hunt, witnesses for the State, or either or any of them, have or has willfully and knowingly sworn falsely as to any fact or matter material to the issue involved in this case, that the jury are to disregard each and every other material fact sworn to on this trial by each and every of said witnesses whom they are so satisfied have sworn falsely as aforesaid, except so far as they may be further satisfied from the evidence that the other material fact or facts so sworn to by each witness or witnesses has or have been corroborated by other creditable evidence in the case." The Court, speaking through GREEN, JUDGE, in that case, on page 756, says: "In determining whether this instruction should have been granted, it is necessary for us to have a clear conception of the respective duties and obligations of the court and jury in the trial of such a case. In England, as well as some of the states of this Union, much more latitude is given to the judge in such a case than is given them in Virginia or in this State. In some of the states the rule seems to be that a judge has the right to express his opinion to the jury on the weight of evidence, and to comment thereon as much as he deems necessary for the course of justice; and an erroneous opinion on matters of fact is no ground for a new trial, unless he goes to the extreme of inducing the jury to believe that he has withdrawn this matter from their consideration,"—citing *Com. v. Child*, 10 Pick. 252; *People v. Rathburn*, 21 Wend. 509; *Johnston v. Com.*, 85 Pa. St. 54. He further says in the opinion: "A far different rule has always prevailed in Virginia and West Virginia. Our authorities are reviewed in the case of *State v. Hurst*, 11 W. Va. 75. It is there said: 'In Virginia the courts have always guarded with jealous care the province of the jury.' Thus, as far back as *Ross v. Gill*, 1 Wash. (Va.) 88, President Pendleton said: 'If the question depends upon the weight of testimony, the jury, and not the court, are exclusively and uncontrollably the judge.' He also quotes from *McDowell's Ex'r v. Crawford*, 11 Grat. 405, as a result of the conclusion of a review of the cases by Judge Moncure: 'They evince a jealous care to watch over and protect the

legitimate powers of the jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that, when the evidence is parol, any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as found, or even an intimation that written evidence states matters which it does not state, will be an invasion of the province of the jury.' And he adds: 'If the province of a jury should be thus guarded with jealous care in a civil case, much more, and for stronger reasons, should it be watched, guarded, and protected in a criminal case.'” In that case the court made this remark to the jury when it was reported to him that one of them said they could not agree: “I see no reason why the jury cannot agree upon a verdict in this cause,” and directed the jury to return. They found the prisoner guilty, and the appellate court deemed this a sufficient reason to set aside the judgment and verdict, and grant a new trial. The case of *State v. Batsall*, 11 W. Va. 704, was also cited. In that case it was held that “a conviction may be had on the uncorroborated testimony of an accomplice, and in such case, if the judge who presided at the trial is satisfied with the verdict, and refuses to set it aside, the appellate court will not reverse the judgment and set aside the verdict on the ground that it rested solely on the uncorroborated testimony of an accomplice.” This conclusion is based on the fact that the jury are the sole judges of the credibility of all admissible testimony, and in this State the Court would err in advising the jury not to convict on the uncorroborated evidence of an accomplice, though this is the common practice in England and in some of the states. But it is utterly opposed to the practice in this State or in Virginia.

On pages 740, 741, 11 W. Va., this Court says: “Our courts are somewhat peculiar in this respect; but the law has been so held in Virginia from the earliest history of her jurisprudence, and we think it constitutes one of the brightest ornaments thereof.” Again, in the case of *State v. Greer*, 22 W. Va. 813, the court refused to instruct the jury, at the instance of the prisoner, as follows: “The jury are instructed that the alleged declarations made by the prisoner after he struck the blow on the deceased are

to be taken in connection with the state of excitement and confusion of mind of the prisoner. If the jury believe he was excited, and in a raving state, as given in evidence, and if such declarations were made under such circumstances, they are to be admissions only that he struck the blow, and not a confession of any particular grade of crime; and the jury are further instructed that such declarations are to be considered by them with great caution, in view of the infirmity of memory and influences which often affect witnesses, and, if they believe that any of the witnesses for the State were actuated by partisan sympathy, prejudice against the prisoner, or bias in favor of the prosecution, who testified to such declarations, such declarations ought to have but little weight.' Commenting on the action of the court below in refusing said instruction, this Court said: "Without attempting to say how much of said instruction propounds the law correctly, it was sufficient, to warrant the refusal of the court to give it, that it asks the court to instruct the jury on the weight of the testimony. No instruction is proper that informs the jury as to what weight the evidence should have upon their minds. If the evidence is competent, it is for the jury alone to weigh it,"—citing *State v. Thompson, supra*. The question presented for the consideration of the Court in *Betsall's Case*, 11 W. Va. 703, was whether a conviction may be had upon the uncorroborated testimony of an accomplice, and the court held (point 10 of the syllabus) that: "While such testimony is suspicious, and emanates from a bad source, yet the jury may believe it, although it is wholly uncorroborated; and in this State it is not proper for the court to give any instructions to the jury as to the weight of such or any other evidence." In the case of *Ware v. State* (decided by the supreme court of Georgia, July 8, 1895), reported in 23 S. E. 410, it was held (point 2 of syllabus) that: "Upon the trial of a criminal case, where the principal incriminating evidence against the accused is purely circumstantial, consisting almost entirely of a similarity between certain tracks alleged to have been discovered near the scene of the crime and other tracks at other places, shown to have been made by the accused, all of which indicated a like peculiarity in the shape of the boot or shoe

with which they must have been made, a charge to the jury that, in a case where there is nothing more than mere tracks, they should not be authorized to find the defendant guilty, unless there is some peculiarity about the tracks, is erroneous, under section 3248 of the Code, as expressing and intimating an opinion upon the weight of the evidence." The court, in its opinion, says: "There was a peculiarity about the track made by the defendant. There was a similar peculiarity about the track made at the scene of the homicide. The court charged the jury that a mere similarity of tracks alone would not be sufficient to sustain a conviction of the defendant, unless there was a peculiarity about the track. The effect of this charge was a direct intimation to the jury—but presumably unintended—that, if there was a peculiarity about the track, then mere tracks would be sufficient to justify a conviction. The vice of this instruction consists in telling the jury at all what evidence would be sufficient to convict. Upon this point jurors are not required to consult the court, nor is the court authorized to give them the benefit of its advice. They are the exclusive judges of the evidence. They are the ministers chosen of the law to deal with these questions of fact. The evidence is sufficient whenever there is enough of it to generate in the minds of the jury a belief beyond a reasonable doubt of the guilt of the accused."

The authorities and decisions above cited and quoted, as I understand them, enunciate correctly the law of this State bearing upon the questions raised by the objection of the prisoner to the third and sixth instructions asked for and given to the jury at the instance of the State, and, as I think, they clearly direct the jury what weight should be given to circumstantial evidence, which constituted almost the entire evidence that was before them. In my opinion, the court invaded the province of the jury in a manner not sanctioned by law, and in so doing committed an error prejudicial to the prisoner. Upon the question as to whether the prisoner was injured by these instructions, this Court has held in the case of *Nicholas v. Kershener*, 20 W. Va. 253 (point 10 of syllabus), that, "where an erroneous instruction has been given to the jury, the presumption is that the exceptor was prejudiced thereby, and

the judgment will be reversed for this cause, unless it clearly appears from the record of the cause that the exceptor could not have been prejudiced by the giving of such erroneous instruction"; and the same is held in the case of *State v. Douglass*, 28 W. Va. 298 (point 6 of syllabus). Can we say that the prisoner was not prejudiced by the action of the court in telling them that "circumstantial evidence is often more reliable than the direct testimony of eye-witnesses," and that "a verdict of guilty in such cases may rest on a surer basis than when rendered upon the testimony of eyewitnesses, where memory must be relied upon, and where passions and prejudices may have influenced them," and in further telling them that, "if they were of opinion that any witness had willfully and corruptly testified to what was false, they were at liberty to reject all his testimony that was not corroborated by other testimony." The jury surely had the right to believe portions of the testimony of a witness, although they may have believed he swore falsely as to other matters, and that, too, without waiting for corroboration; and it had a tendency to prejudice the prisoner when the court told the jury that they were at liberty to reject the testimony of such witness without also telling them that they were at liberty to credit his testimony.

It is further claimed by counsel for the prisoner that the court erred in admitting improper evidence against the accused, and rejecting proper evidence offered by him; also in improperly admitting expert testimony in favor of the State, and in improperly rejecting expert and other evidence offered in behalf of the defendant, as set forth in bill of exceptions No. 4. During the progress of this trial several medical witnesses were examined, and it is claimed by the plaintiff in error that they went beyond the limit prescribed for witnesses of this character, in this; that they gave their opinions and conclusions in regard to facts which were brought to their attention, conclusions which it required no skill or science to reach, but conclusions which the layman or juryman were just as capable of correctly arriving at from the facts as the medical expert. The object in the examination of experts, and the manner in which their testimony is limited and circumscribed by law, is clearly and concisely stated in the case

of *Hunt v. Gaslight Co.*, 8 Allen, 169, where it is held that "the object of all questions to experts should be to obtain their opinion as to matters of skill or science which are in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts." The theory of the State in the case under consideration was that the deceased came to her death as the result of choking, inflicted upon her by the prisoner, and that, after death had resulted, she was thrown in the creek, to create the impression that she had drowned herself; while, on the other hand, the contention of the prisoner was that for some time she had shown indications of melancholy and insanity, and that in a fit of despondency she had thrown herself in the water, and the abrasions on her face and neck were either caused by the branches of trees which hung down near the creek, or by her own hands, in attempting to make a speedy end to herself; and testimony was adduced for the State and for the prisoner in support of these opposing theories. To support the contention of the State, medical experts were introduced, and their opinions were called for, with a view of influencing the verdict of the jury, and certain questions were propounded to these medical men, which were objected to by the prisoner. The objection was overruled by the court, and the prisoner excepted, and the action of the court is assigned as error.

Now, in order to pass correctly upon the ruling of the court upon these questions, it becomes necessary to examine the law governing the admission of expert testimony, and then determine whether the questions propounded to these medical witnesses were admissible under the rules of evidence. Now, in the eighth volume of the *Encyclopedia of Pleading and Practice*, under the title of *Expert Witnesses* (page 751), it is said: "While the admission of the opinion of experts necessarily gives rise to very nice distinctions between facts and findings, it nevertheless does not annul the rule of law axiomatic with reference to them, as well as to all witnesses, that they must not be so examined as to substitute their opinions for the verdict, and thus completely usurp the peculiar province of the jury,"—citing numerous authorities, and, among others, *Livingston v. Com.*, 14 Grat. 594; *McMechen*

v. *McMechen*, 17 W. Va. 683; *Kerr v. Lunsford*, 31 W. Va. 659 (8 S. E. 493); *Bowen v. City of Huntington*, 35 W. Va. 682 (14 S. E. 217). And on page 754 it is further said: "Although an expert may have heard all the testimony in the case, he cannot be asked to give his opinion, based merely upon his having heard such testimony, whenever there is a conflict therein, unless the same is hypothetically propounded to him." And on the next page we find it stated that "an expert cannot be asked to give his opinion upon doubtful facts in the case on trial which remain to be found by the jury, but a similar case may be hypothetically put to him, based upon the evidence in such case." Starkie, *Ev.* (9th Ed.) top page 154, says: "In general, scientific men ought to be examined only as to their opinion on the facts proved, and not as to the merits of the case." And on page 157 the same author says: "But where the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled or scientific witnesses is not admissible." JUDGE GREEX, in his opinion in the case of *Welch v. Insurance Co.*, 23 W. Va. 306, quotes the above from Starkie, and adds, "He is unquestionably right in this position."

Let us look now to the character of some of the testimony of the medical witnesses examined by the State and objected to by the prisoner; referring first to the testimony of Dr. M. H. Brown, who assisted in the autopsy. He was asked, "What was the nature of the wounds on the neck? Describe them;" and replied: "It was what we term an 'abrasion.' The skin was removed, and a little blood had come to the surface,—what you people would call a 'scab.' Some were larger than the others." Again, this witness was asked, "What did these marks on the neck resemble, if anything, when you looked at them?" In his answer he says, "Please explain what you mean by that—'what did they resemble?'" He then was asked, "What did they look like as to how they were made?" This question was objected to, the objection was overruled, and an exception taken. The witness then answered, "When I looked at these marks, the idea seemed to come to me that they were made by hand." So it is perceived that, instead of describing the appearance and size of the

abrasions, so that the jury might know upon what he based his inference, he swears to his conclusions from the appearance of the marks, and it required no skill or science on his part to tell what impression the appearance of these abrasions made upon his mind; and, if he had answered the question properly, and told what the abrasions resembled,—that is, what was their general appearance,—the jury would have been just as capable to form a conclusion as he was, and it presents just such a case as the books tell us an expert is prohibited from giving his conclusion or opinion in, and in which he cannot give his opinion without invading the province of the jury. Again, Dr. Few, a witness for the State, when asked to describe the wounds on the neck as carefully as he could, answered: “They were from mere scratches, or simple abrasions, to complete removal of the cuticle. They were superficial, only on the surface,—and were bright red, from the clotted condition of the blood on them. There was no discharge.” And when asked, “From your examination of these external marks on the neck, what did these marks resemble, if anything?” the question was objected to, overruled, and an exception taken, and the witness answered: “Well, I have nothing in pathology or medicine to give me a standard by which to compare the wounds, but they suggested themselves to me on first sight as being finger marks. I can’t explain it through any logical reasoning at all, but a mere suggestion.” Now, this question and answer demonstrate clearly that the opinion called for in the question was not such as an expert or a witness examined as an expert had a legal right to give, as the witness answers frankly that he had nothing in pathology or medicine to give him a standard by which to compare the wounds (that is, neither science nor skill were required to answer the question), yet he proceeds to tell what they suggested to him on first sight, in support of the theory of the State (something which any man who had never opened a medical book could have done as well); and, as I think, the objection was overruled in violation of the rules of evidence with regard to expert testimony, and to the prejudice of the prisoner. The same remarks apply to the testimony of Dr. Fitch, a witness for the State, who was asked to state what these marks re-

sembled, if anything. An objection was made, which was overruled, and an exception taken, and the witness answered, "The impression that I formed was that they were made with the hands and fingers or finger nails." Again, Dr. J. J. Hall was interrogated by counsel for the State as follows: "How did the external marks of violence indicate, if anything, as to how they were made? What did they resemble, if anything?" and over the objection of the prisoner was permitted to answer: "There is no rule laid down by which we can form an opinion as to what produces an abrasion, but I will say they were suggestive of finger marks, because they resembled marks of that character which I have seen, and known to have been produced in that way." It is perceived at once by the answer of this witness that what he has acquired in the way of skill and science in his profession is not brought into requisition to assist him in making this answer. He frankly says, "There is no rule laid down by which we [physicians] can form an opinion as to what produces an abrasion," but he would say they were simply suggestive of finger marks because they resembled marks of that character, which he had seen, and known to have been produced that way. This, then, was not an answer which an expert would be allowed to make. It required the use of no skill or medical science to make it; and yet the objection to the answer was overruled.

The rule in regard to the admission of expert testimony is stated by Rog. Exp. Test. p. 8, § 5, as follows: "The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of the nature of a science, art, or trade as to require a previous habit of experience or study in it in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in the particular science, art, or trade to which the question relates are admissible in evidence." The propriety and necessity of confining expert witnesses, in delivering their

testimony, to the strict legal rules governing the admission of such evidence, is apparent when it is considered that the testimony of witnesses of this character, and their opinions derived from peculiar opportunities of study and practical experience, necessarily have peculiar weight with the jury. In the case of *Overby v. Railway Co.*, 37 W. Va. 525 (16 S. E. 813), this Court held (point 5 of syllabus) that: "If the facts in a case can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them, and draw inferences from them, as witnesses, then the opinion of experts can not be received in evidence as to such facts." Also, in point 6 of syllabus in same case, that "the opinion of a witness who neither knows nor can know more about the subject-matter than the jury, and who must draw his deductions from facts already in the possession of the jury, is not admissible." Rog. Exp. Test. p. 12, § 8, speaking as to the admissibility of expert testimony, says: "Whenever the subject-matter of inquiry is of such a character that it may be presumed to lie within the common experience of all men of common education moving in ordinary walks of life, the rule is that the opinions of experts are inadmissible, as the jury is supposed in all such matters to be entirely competent to draw the necessary inferences from the facts testified to by the witnesses. The testimony of experts is inadmissible upon a matter concerning which, with the same knowledge of the facts, the opinion of any one else would have as much weight." "It is only admissible when the facts to be determined are obscure, and can only be made clear by and through the opinions of persons skilled in relation to the subject-matter of inquiry." In the case of *Bowen v. City of Huntington*, 35 W. Va. 682 (14 S. E. 217) (point 4 of syllabus), this Court held that, "where the conclusions called for by a hypothetical question from a medical man, who is being examined as an expert, depends upon facts, the evidential weight of which can only be determined by those familiar with that specialty, then those conclusions may be given by an expert in such specialty." We also find the law thus stated under the head of "Expert Witnesses" in 8 Enc. Pl. & Prac. p. 755: "An expert can not be asked to give his opinion upon doubtful facts in the

case on trial, which remain to be found by the jury, but a similar case may be hypothetically put to him, based upon the evidence in such case." And the same book, on page 744, says: "The principal object in view in the examination of expert witnesses being to elicit from them opinions or conclusions drawn from the facts, rather than the facts themselves." This species of testimony forms in this respect a notable exception to well-established rules of evidence. The rules governing the introduction of this species of testimony should not, therefore, be relaxed, but should be strictly enforced with the greatest caution and discrimination. Dr. Hartigan, a witness who did not assist in the autopsy, was asked the following question: "From the report of this autopsy, does it not appear that there was simple engorgement of the vessels in that thyroid, and nothing in that autopsy to show that there was any extravasation or rupture of the blood vessels," and answered: "Yes, sir. The examination of the deeper structures of the neck shows an engorged condition of the thyroid region." This question and answer we do not regard as proper under the rules governing the admission of expert testimony. In the case of *Indemnity Co. v. Dorgan*, 7 C. C. A. 581 (58 Fed. 945), the law is thus stated, —as we think, correctly: "A physician cannot be asked whether or not, in his judgment, from testimony that he has heard, an autopsy was such as to enable a physician to state the cause of death with any degree of certainty, but the question should recite the scope and character of the autopsy." Taft, J., in delivering the opinion of the court, says: "This question was clearly incompetent, because it asked the witness, who was a physician, to make his own inference as to what the evidence of the other witnesses tended to show, and then, upon such inference, to give his opinion. To properly elicit his opinion as to the character of the autopsy, and its usefulness in showing the cause of the death, counsel should have stated the scope and character of the autopsy as he understood it, so that the jury, in weighing the answer of the witness, could know exactly upon what facts it was based."

It was not alone, however, in the admission of expert testimony in this case that the prisoner was prejudiced by the ruling of the court, and had a right to complain. When

we refer to the testimony of Stephen G. Hess, who was examined as a nonexpert witness, we find that, after stating that he had seen the marks on the neck of the deceased, he was asked, "What did these marks resemble?" and was allowed to state, notwithstanding the objection of the prisoner, that "they looked to me as though some one had just grabbed hold that had a considerable grip." He was also asked to state whether or not he saw any other marks on her body, and answered, "Yes, sir; some other marks or bruises on the arm." He was then asked to describe those on the arm, and replied, "They were on the left arm, as well as I recollect." He was again asked, "Describe them, if you please," and answered, "A kind of a bruise on the arm, as though some one had held it with a severe grip," which answer was excepted to. Now, this witness, instead of describing the wounds and bruises he saw upon the body of the deceased, proceeds to give his conclusions, and produces the same impression upon the jury as if he had stated that, in his opinion, David Musgrave gripped the arm of his wife with one hand, while he choked her with the other. His answer was not responsive to the question; but, when asked "What did these marks resemble?" proceeded to give his opinion and conclusion as to the manner in which the wounds and bruises were inflicted, which was not allowable according to the rules governing such evidence. It is true that in the case of *State v. Welch*, reported in 36 W. Va. 690 (15 S. E. 419), the witness Gibson described a depression in the bed and a clot of gore in it, and was allowed to express the opinion that there had been a pool of blood there, and this Court held that it was not error; but the witness in that case drew no inference and expressed no opinion as to how or in what manner the blood stain was caused. He was not allowed to say, as in this case, that it looked as though some one had beaten the head of the deceased with a brick,—the theory in that case of the State being that the deceased was killed by beating her on the head with a large piece of fire brick, while she was lying in bed. The general rule is stated in 7 Am. & Eng. Enc. Law, p. 492, as follows: "The general rule is that witnesses must testify to facts, and not to opinions. They must only state facts, not draw conclusions or inferences. To do so is to usurp

the province of the court or jury." To this general rule, as a matter of course, there are exceptions, but the answers elicited from the witness Hess in this case, and which were allowed to go to the jury, are not embraced within any of the exceptions. Another witness,—Columbus Michael, a nonexpert,—after stating that he saw some scars on the neck, some ten or a dozen, was asked to describe them, and answered, "I did not examine them pretty close." He was then asked, "What did they resemble, if anything?" and answered, "They just resembled as if some man had taken another one by the throat," which question and answer were objected to, and the objection overruled. In the case of *Taylor v. Railroad Co.*, 33 W. Va. 39 (10 S. E. 29), this Court held that opinions merely of a witness are not generally admissible evidence; and it also held that, where illegal evidence is admitted against the objection of a party, it will be presumed that it prejudiced such party, and, if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for the reversal of the judgment; but, if it clearly appear that it could not have changed the result if it had been excluded, it will not be the cause of reversing the judgment. And the same is held in the case of *Hall v. Lyons*, 29 W. Va. 410, (1 S. E. 582). Bishop, in his valuable work on Criminal Procedure (volume 1, § 1177), under the head of "Opinion of Witnesses," says: "We have seen that what a witness describes as personally observed is, in philosophical truth, merely his inference from sensations felt; and there is no evidence which is not, to this extent, presumptive. In other words, all testimony is to opinions. But the witness alone is competent to form an opinion as to the cause of his sensations of this class. As to them, he is an expert, and the only expert in existence. So, when he speaks of his opinions in this class of facts, he and his hearers alike term his opinions "facts." But an opinion which the jurors are in a situation to draw as well as he, will be drawn by them, and, though he should also have formed his opinion, he will not be permitted to state what it is." Again, in 7 Am. & Eng. Enc. Law, p. 493, it is said: "Opinions are never received if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable

of comprehending and understanding." Also, in *The Nereide*, 9 Cranch, 388, it is held that "a witness ought never to swear to inferences, without stating the train of reasoning by which his mind has been conducted to them." In the case at bar there could have been no difficulty in the way of either of these nonexpert witnesses describing to the jury the size, number, and appearance of the scratches on the neck of the deceased, and giving their locality; but, without attempting to do this, the court permitted them to volunteer their opinions as to the manner in which the scars were inflicted, and stated that "they resembled as if some man had taken another one by the throat." This was the way in which Columbus Michael expressed his opinion, while Stephen G. Hess, another nonexpert witness, expressed the opinion that "they looked to him as though some one had just grabbed hold that had a considerable grip." These opinions, thus expressed, are contrary to the rules of evidence governing the admission of testimony of that character, and, as we have seen, they must be presumed to have been prejudicial to the prisoner. The prisoner was on trial, charged with one of the gravest offenses known to the law. The theory of the State was that he had taken the life of his wife by choking her to death, and then throwing her body into the creek, to create the impression that she came to her death by drowning; and to allow a nonexpert witness to stand before the jury, and state, because he had seen some scars on her neck, his opinion that they were caused by some one grabbing that had a considerable grip, or that they looked as if some man had taken another by the throat, would, in my opinion, be subversive of long and well established rules of evidence in cases of this character.

It is claimed that the court erred in not taking the jury to view the locality where the deceased was found. This matter, as I understand it, is addressed to the discretion of the court (see *Gunn v. Railroad Co.*, 36 W. Va. 165), (14 S. E. 465), and this Court would not review that discretion unless it was made to appear that the prisoner was prejudiced by such refusal; but, for the reasons above stated, this cause must be reversed, the verdict and judgment set aside, and a new trial awarded.

BRANNON, JUDGE: (*dissenting*).

David Musgrave was convicted in the Circuit Court of Monongalia County, in June, 1895, of the murder in the first degree of Emeline Musgrave, his wife, and sentenced to confinement in the penitentiary for life, and has brought the case to this Court by writ of error. Some points made in the assignments of error were not relied upon in this Court. Counsel for the plaintiff in error say that the court erred in giving for the State certain instructions.

Instruction 3: "The court instructs the jury that circumstantial evidence is legal evidence, and in most criminal cases it becomes necessary to resort to circumstantial evidence. Criminal acts are usually performed in secrecy. Evidence should not be discredited because it is circumstantial. It is often more reliable than the direct testimony of eyewitnesses when it points irresistibly and conclusively to the commission by the accused of the crime. A verdict of guilty in such cases may rest upon a surer basis than when rendered upon the testimony of eyewitnesses whose memory must be relied upon, and whose passions and prejudices may have influenced them." (Foregoing instruction, *verbatim*, given by court in *State v. Hayward*, 65 N. W. 63).

Instruction No. 6: "The court instructs the jury that you are the judges of the weight and credibility of the witnesses who have testified in this case, and that you have a right to give such weight and credit to the testimony of a witness as, in your judgment, from all the circumstances, it is entitled to. And if you are of the opinion that any witness has willfully and corruptly testified to what is false, you are at liberty to reject all his testimony that is not corroborated by other evidence."

It is said that these instructions both intimate to the jury the opinion of the court upon the weight of the evidence, and thus invade the province of the jury as the sole judges of the weight and effect of the evidence, and violate the rules laid down in *State v. Hurst*, 11 W. Va. 54, and *State v. Betsall*, *Id.* 703, and other cases of like import. While not intending to intimate a disposition to cross the barrier defending the province of the jury from intrusion by the court, yet when we look at the practice in almost all the states of this Union and in England en-

joining charges by the judge to the end that juries may be kept from error by a review of the evidence by the court, I venture to say that the courts of Virginia and this State have gone very far with this doctrine, if not too far, and we ought not, by hypercritical construction of instructions, to carry it so far as to overthrow verdicts fairly rendered upon fair trial. We must attribute to juries some intelligence. We must not strain every word dropping from a judge inadvertently when ruling upon the admissibility of evidence or other passages in the trial, or strain instructions, as subverting the freedom or misleading the common sense of juries. Rather should we say they likely did not do so, unless plainly calculated to do so. Instruction 3 simply states the principles by which circumstantial evidence is to be treated by courts and juries, found in all books and decisions upon the subject. Those principles are designed to guide courts and juries in applying circumstantial evidence in trials. Is it possible that an instruction like No. 3, laying down the doctrine of the law of evidence, can be said to impinge upon the domain of the jury? For what purpose do our books on the science of evidence treat of the philosophy of evidence, if not to furnish human tribunals lights by which to apply that evidence, to keep them from error? These rules are intended as much for the jury as for the court. Yet you go through a long trial depending on circumstantial evidence, and, according to this theory, they are to be hidden from the jury, unless a lawyer reads them, and the court must not mention them to the jury; and when the jury, for want of their aid, finds a verdict not conforming to them, these rules are then presented as cause for setting it aside. A verdict was set aside in *Flannagan's Case*, 26 W. Va. 116, because the jury did not conform to these principles. Would it have been error for the court to have laid down by instructions those rules as this Court laid them down, and thus informed the jury of them? Surely not. The State could not have complained; neither could the defendant. *Perry's Case*, 41 W. Va. 641, (24 S. E. 634), contains principles warranting these instructions. That holds it error for a court to refuse to tell a jury that it is their duty to scrutinize with care and caution the uncorroborated and contradicted testimony of a witness. That goes further to invade

the jury's province than these instructions. It may just as well be said that it tells a jury to disregard an uncorroborated and contradicted witness as that these instructions pass on the weight of circumstantial evidence. JUDGE ENGLISH'S opinion does not advert to that recent Case of Perry. It is far more inconsistent with *Betsall's Case* and *Thompson's Case*, 21 W. Va. 758, than this instruction. Counsel for the prisoner invariably call the jury's attention impressively and urgently to the cautionary rules pertinent to circumstantial evidence, and in this case asked an instruction (No. 5) given below; and it would be one-sided to say that the prosecution could not ask such an instruction as No. 3 to avoid any misapplication of such rules. This instruction is simply general in statement, as a general rule, and does not refer to any particular evidence. This instruction in itself, by the words "irresistibly and conclusively," certainly does not tolerate any weakness or uncertainty of evidence. In other respects it guards the defendant. But if, possibly, there could be any criticism of it as endangering the prisoner, other instructions, particularly Nos. 4 and 5 given for defendant, would be its antidote, as they state with emphasis the caution to be observed in using circumstantial evidence.

Instruction No. 4: "Before the jury can find a verdict of guilty of murder in this case, it must not only be proven beyond a reasonable doubt that Emeline Musgrave was actually murdered as a first indisputable fact, but it must also be proven beyond any reasonable doubt that it was the prisoner, David Musgrave, and could by no reasonable hypothesis have been any other person, who committed the crime."

Instruction No. 5: "As guides to the safe administration of justice in criminal cases, where the guilt of the accused is to be ascertained and determined upon circumstantial evidence, as in this case, the court instructs the jury that: First. It is essential that all the circumstances from which the conclusion is to be drawn shall be established by full proof, and the State is bound to prove every single circumstance which is essential to the conclusion in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circum-

stance. Second. All the facts and circumstances, when established by full proof, must be consistent with the hypothesis of the guilt of the accused. Third. It is essential that the circumstances should be of a conclusive nature and tendency. Evidence is always indefinite and inconclusive when it raises no more than a limited probability in favor of the fact, as compared with some definite probability against it, whether the precise proposition can or cannot be ascertained. It is, on the other hand, of a conclusive nature and tendency when the probability in favor of the hypothesis exceeds all limits of an arithmetical or moral nature. Such evidence is always insufficient where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true, for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of truth. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be. Fourth. It is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved by the State. From these another rule results in criminal cases. It is this: That the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, amounts to nothing unless the *corpus delicti*—the fact that the crime has been actually perpetrated—be established by full proof, for, so long as the least reasonable doubt exists as to the act, there can be no certainty as to the agent."

It is said that the State's instruction No. 6 is particularly objectionable, because it, in substance, tells the jury that the evidence of a witness who has sworn falsely is of no weight. It does not say so. It does not say that the jury must or ought to reject such evidence; by no means. It tells the jury it has the discretion and power to discredit such evidence, if its judgment calls for it. What else does it, fairly construed, mean? Would it mislead any sensible jury? The jury has that power. There is a rule in the philosophy of evidence that a witness swearing falsely in one thing affords some ground to discredit him in all

(“*Falsus in uno, falsus in omnibus*”). That is a matter left to the jury under all the circumstances, and this instruction goes no further than this. Far different was instruction No. 3 condemned in *Thompson's Case* as it commanded the jury to disregard all evidence of a witness swearing falsely as to anything.

Instruction 9: “The jury are instructed that circumstantial evidence must always be scanned with great caution, and can never justify a verdict of guilty, especially of murder in the first degree, unless the circumstances proved are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt (but the jury must further remember that crimes are sometimes committed with such secrecy that to require the production of a witness who saw the act committed would be to defeat public justice, to deny all protection to society, to let the greatest offenders go free, and the most heinous crimes go unpunished); and the jury are further instructed that in cases of circumstantial evidence, where all circumstances of time, place, motive, means, opportunity, and conduct are proved beyond a reasonable doubt, and concur in pointing out the accused as the perpetrator of the crime beyond a reasonable doubt, it must produce a moral, if not an absolute, certainty of his guilt.” *State v. Baker*, 33 W. Va. 371, 372, (10 S. E. 639). This instruction is conceded to be correct in the abstract. The principle is one stated by the writer upon the science and philosophy of evidence most eminent to this day of all writers upon the law of evidence, Starkie; and upon the approval of the Virginia court of appeals in *Dean's Case*, 32 Grat. 912, it was stated in *Baker's Case*, 33 W. Va. 319, 371, (10 S. E. 639). If the law of evidence is stated by the court of authority, and is pertinent to the case on trial, it can not be error to use it. It is said a clause in it intimated the opinion of the court that a deep-dyed villain was on trial, and thus prejudiced the jury against him. It plainly purports to state a general proposition, abstract, and not hinting at the prisoner. It is full of caution, emphatic in the expression of caution.

Certain evidence was admitted, which is said to have been improper. On the night of December 13, 1894, Eme-

line Musgrave was found lying dead, face downward, in Big Indian Creek, in very shallow water. An inquest was held, and she was buried, and a few days later the body was exhumed, and a post mortem examination held. The theory of the State was that her husband choked her to death, and put her body in the creek, to create the impression that she drowned herself; or choked her into a state of insensibility, and, believing her dead, took her body to the creek, and threw it in the water, where she may have died without recovering consciousness, or, having partially revived from contact with the cold water, may have died from drowning. There were a number of marks and abrasions upon both sides of her neck, and the State sought to show that these marks were marks made by fingers and finger nails in choking. Various witnesses, expert and nonexpert, were asked what, in their opinion, produced these marks, and they answered that they had the appearance of having been made with the fingers. It is strenuously urged that opinion evidence is not generally admissible. It is clear that the State had a right to show that such marks were made with the fingers. But how? The defense says it must adduce evidence descriptive of the marks, and let the jury judge how they were made. But it would be difficult to exactly describe their form, outline, and exact appearance, so as to portray them to the jury as they appeared to the eye; so as to let the jury see them, as it were. Their appearance was material. She could not be brought back from the grave. Decomposition had destroyed the marks. How can this appearance be preserved to the jury as naturally—as truly—as is possible? Only by evidence of the marks as they appeared to those who saw them, and their opinion on view of them. They could not otherwise be reproduced. Necessity called for this opinion evidence. In *State v. Welch*, 36 W. Va. 690, (15 S. E. 419), we held that a witness might give his opinion that a depression in a bed was, from its shape and appearance, caused by the head of a person, the witness having seen it; giving as one reason that the bed could not now be produced to the jury. So here the dead body can not be laid before the jury that they may look upon the wounds, in order that those wounds may, from their appearance, tell the jury what caused them; and we can

only do the next best thing,—that is, have witnesses who saw them to say what, in their opinion, caused them. Since the *Welch Case* I met with the case of *Com. v. Sturtevant*, 117 Mass. 122, (19 Am. Rep. 401), in which the question is fully considered, as also in the note to that case, and it is held that “common observers, having special opportunity for observation, may testify to their opinions as conclusions of fact, though they are not experts, if the subject matter to which the testimony relates can not be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express his opinion are such as men in general are capable of comprehending and understanding.” This is a very accurate statement, and supports the *Welch Case*. A witness was there allowed to say in what direction, in his opinion, the blood forming a blood mark had come. It was permitted to say whether, in his opinion, shoes taken from the defendant’s house, claimed to fit his track, had been recently washed. I find it stated in *Rog. Exp. Test.* §§ 3, 4, that a witness may state his opinion “when the primary facts on which it is founded are of such a nature that they cannot be adequately reproduced or described to the jury, so as to enable another than the actual observer to form an intelligent conclusion from them.” Necessity calls for this. 1 *Whart. Ev.* § 511, lays down the rule that opinion evidence is admissible as follows. “A *fortiori*, whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury, or when language is not adequate to such realization, a witness may describe it by its effect on his mind, even though such effect be opinion.” Now, you cannot precisely describe in words the shape, color, and general appearance of finger marks on the neck of a dead person. The description would not be plain and palpable to the jury. Much less can you describe wounds made by finger nails. What a more common matter of everyday observation than the human foot? You allow witnesses to give their opinions that impressions in snow or mud are those of the foot, and of a particular person. *State v. Milmeier* (Iowa; 1897) 72 N. W. 275,—allowing witness to say tracks looked like prisoner’s foot. How certain is the hunter that a track is that of a

bear? He is permitted to express his opinion of it. What a more common matter of every-day observation than the human hand? If its imprint were in snow or mud now lost, would you not allow an opinion of one who saw it that it was made by the hand? Why reject the opinion of a witness that the impression of a bloody hand on wall or floor belonged to a hand? You would admit all this evidence. Why reject it when the impression is on the neck? We admitted evidence that spots looked like blood marks in *Baker's* and *Welch's Cases*. The Massachusetts court, in *Cone v. Dorsey*, 103 Mass. 413, allowed a witness to say that hair on a club appeared to the naked eye, human, and to resemble that of deceased. (I notice that the work issued since this opinion was delivered, Gillett on Indirect & Collat. Evidence § 213, sustains the views here expressed as to such opinion evidence).

But it is urged that, if this opinion evidence is admissible, it is only so when the witness has stated the character and description of the wounds, and then may express his opinion as to how they were made. The general rule is that the witness is to relate the facts as fully as he can, and add his conclusion from all he saw. *Taylor v. Railroad Co.*, 33 W. Va. 39, 54, (10 S. E. 29). It is said in brief that out of eighteen witnesses, eleven were allowed to give their opinions without any description whatever of the marks on the neck and throat of deceased, as to number, position, size, or any other description. An examination of the evidence of these witnesses has shown me that they give description by number, location, color, size, length, whether abraded or not, direction of mark, general appearance, with reasonable fullness,—as much fullness as non-expert witnesses would be expected to do, quite fully, indeed. The witnesses would describe them before the jury by illustration with their hands on their necks or throats. This being so, there was a sufficient foundation laid for the opinion evidence. Its weight was for the jury. "If any material facts at all are stated by the witness warranting the inference that he has sufficient knowledge to form an opinion, it is the duty of the court to permit it to go to the jury for whatever it may be worth," said the court in *Goodwin v. State*, 96 Ind. 558; and Rog. Exp. Test. p. 9, says that:

“While the general rule is that the witness must state the basis, in some cases it is impossible, in the nature of things, to describe the facts, and the opinion of the witness will not be excluded in such a case because of his inability to give a description of the facts.” In *Jones v. Fuller*, 19 S. C. 66, it is held that, while it is necessary that the witness should first state the facts on which he bases his opinion, where the facts are such as are capable of being reproduced in language, it is not necessary to do so where the facts are not capable of reproduction in such way as to bring before the minds of the jury the condition of things upon which the witness bases his opinion. The same principle in *Sydleman v. Beckwith*, 43 Conn. 9. The evidence tended to show nineteen wounds or marks on the throat and neck of the deceased, to say nothing of wounds and bruises on the arms, one below the eye, one above, one on the hand. How difficult to describe those throat marks so accurately—their exact look—as to give the jury the same impression of them as they made on the witnesses who saw them.

Prisoner's counsel insist that the court erred in not granting a motion to take the jury to the creek where the body was found, for a view. Counsel thus, in substance, state the reason for the view: The theory of the State was that the deceased was choked, and from the choking died, or was rendered insensible, and was carried and put in the creek where she was found, either after she was dead, or after she was insensible; and, if not dead when put in, that she drowned. The State insisted that there was no froth coming from the mouth, and the water was still, and this indicated that she was not drowned; and the marks on throat and neck indicated that she had been choked to death before being put in the water. The theory of the defense was that she had a suicidal mania; had before tried to hang herself; and had left her husband's side after they had retired, and he, supposing she had gone out at a call of nature, was not alarmed, but, not returning, became uneasy, and on search she was found in the water; that she had thrown herself into the creek; and there was a tree on its bank, with jagged branches near the ground, which, as she went in, she struck, and thus produced the marks on the neck and throat; or that in the

convulsion of drowning she clutched her neck and throat with her hands, and thus produced the marks; and the water where she was was running water, which would account for the fact that no froth came from her mouth. The State introduced witnesses testifying there was no tree as claimed by the prisoner, and the location of the place not as claimed by him. The defendant introduced evidence of the tree's being there, and of its jagged branches, and of the running water. He introduced photographs of the place, but claimed they were imperfect representations of the place. Views are very inconvenient and productive of delay. Only where the nature of the case peculiarly requires it,—where by evidence the place and surroundings cannot be shown, and they are indispensable to a correct understanding and just decision,—should they be enforced; certainly not otherwise on appeal to this Court. In *Gunn v. Railroad Co.*, 36 W. Va. 165, (14 S. E. 465), it is held that a demand for a view is peculiarly within the discretion of the trial court, and, before its ruling thereon will be disturbed, it must be made clearly manifest that it was necessary to a just decision, was practicable, and its refusal probably to the injury of the party. We can not see such necessity in this case. Mere conflict of evidence as to things of a nature readily provable furnished no ground. Places and grounds are the scenes of transactions involved in every suit, and application of this statute here would equally call for a view in almost every case.

The admission of certain expert evidence is complained of as error. Dr. Brown was asked, "From your examination of the deceased, what, in your opinion, caused her death?" and answered, "I think she was asphyxiated." He was requested to "state whether or not that death resulted from natural or violent causes," and answered, "Violence." It is argued that he was asked these questions without having had any hypothetical question propounded to him to enable the jury to know on what he based his opinion. Is it meant that the questions should have been put in hypothetical form? If so, the proposition is untenable, as this physician personally examined the corpse at the creek when found, and at the subsequent formal autopsy, and from facts testified by himself was, as an expert, authorized to give a proper opinion. A hypo-

thetical question to an expert is only necessary where he does not base his opinion on facts testified to by himself, but on facts testified to by others. *McMechen v. McMechen*, 17 W. Va. 683, 694; Rog. Exp. Test. 75. JUDGE ENGLISH seems to overlook this distinction. The questions themselves are, in their nature, proper, as it is well settled that a physician or surgeon may give his opinion on facts testified to by himself or others as to wounds proven to have been inflicted on a deceased person, whether such wounds would be cause adequate to produce death, or were the actual cause of death. *Livingston's Case*, 14 Grat. 592; Rog. Exp. Test. § 49, p. 119; 1 Greenl. Ev. § 440. "It is settled that medical experts may state opinions as to the means by which a wound was inflicted." Rog. Exp. Test. § 53, p. 127.

The following question is said to be improper, put to said physician: "What conditions or indications did you find on your examination at the creek, on the night you first saw her, or upon your examination at the autopsy, inconsistent with the theory that the deceased came to her death by drowning, if anything?" Now, the State had the right to prove that the deceased died from violence, not by drowning. If she was choked to death, her body would present appearances indicative of that cause of death; if she drowned herself, it would present appearances indicative of that cause of death. The State had the right to show the presence of conditions or indications upon the body pointing to death by violence, and inconsistent with the theory of drowning; to prove signs on the body not found in cases of death by drowning. Counsel say the State could put an hypothesis, and then ask the opinion of the physician whether the deceased came to death by drowning. If entitled to give evidence to prove that she did not come to death by drowning, as it did, why could it not fortify this theory by showing reasons for the conclusion by showing the presence of appearances negating the theory of drowning? The question simply called for those appearances. You would not deny the State's right to show signs of death by violence. Why shall it not repel the theory of drowning by showing signs denying it? The defense would be allowed to show signs of death by drowning, and

why not the State be allowed to show those tending to repel it?

The following question is objected to: "I will have you to state whether or not the condition of the thyroid region, externally and internally also, would be inconsistent with the theory of drowning?" What has been just said as to the next preceding question will also apply here. The witness had made examination of the thyroid region, had stated it in evidence, and surely he could have been asked if it indicated violence; and why not be asked if it indicated a condition telling of something else than drowning? "It is a rule of evidence that either party may ask an expert as to the reasons on which his opinion is based." *Rog. Exp. Test.* § 37. These questions only amount to this.

Objection is also made to the following question: "If all the external marks of violence found by your examination, and set forth in your autopsy as heretofore described, producing internal conditions resulting therefrom, had been received by a person at or near the same time, or in quick succession, what effect would they have upon the person as to syncope, and vitality or consciousness, in your opinion, except the one you have described at the insertion of the deltoid muscle?" Dr. Brown had said he found on the left frontal region a wound an inch long, two or three scratches on the right side of the nose, and a dozen on either side of the neck, one on the left arm, near the insertion of the deltoid muscle, one on the middle and lower third of the radius about an inch in diameter, one on the ulnar side two inches in diameter, both of which were bluish black discolorations, one on the right arm half an inch in diameter, one on the wrist,—showing the jury the place of the wounds. He had minutely described an engorged state of the blood vessels of the neck, the jugular vein on both sides of the neck, and other smaller blood vessels, the abrasions of the skin and their bleeding, of the right side of the heart being distended with blood, the left ventricle with little blood in it, of the distention of the air cells of the lungs, and of the rupture of some of them, and of one or two coming together, of the emphysematous condition of the lungs, of the appearance of the throat inside, and of other details of the appearance of the body. This

question, based on what he said of marks of violence apparent in his first examination of the body and the subsequent autopsy, revealing external and internal condition, was designed to elicit his opinion as an expert as to the probable effect of the violence in the way of producing fainting, loss of vitality and consciousness, to support that phase of the state's theory of murder that deceased had been by violence rendered unconscious, and nearly dead, and then put in the water and her death accomplished. The question sought to show that such wounds and violence and their resultant condition of the body would indicate the probability of such syncope or fainting. Why it was not legitimate, I am unable to see.

Counsel say the following question was bad: "Suppose the deceased had received the wounds or contusions, and had the internal condition as described by you produced thereby, what effect would that have upon the consciousness of the deceased, in your opinion?" He answered, "Judging from the revelations of the autopsy, I should think the deceased was unconscious." What I have said as to the next preceding question equally applies to this question. The following question was put to Dr. Brown by prisoner's counsel, and the court refused to allow it to be answered: "Do not your medical books, authorities, and instructions at the schools in your profession teach you that in the act of drowning there is great constriction of the muscles of the throat in the thyroid region, and a convulsive effort to prevent the ingress of water, and a strong, spasmodic effort to breathe, resulting in a contraction of the muscles?" This question called for what books say, what medical professors say in lectures, and also the interpretation by the witness of what the books and professors say. The professor's statement to his class is unsworn. The author's statement in his book likewise. Books and professors differ, and change with the advance of science and discovery. A few states perhaps,—as Alabama and Iowa,—have admitted the books themselves. In Iowa such a question as this was asked, but refused, because it invoked the opinion of the expert as to the teaching of the books, but the books were held admissible. But in England and the great bulk of our states it is not allowed to introduce books on science, much less the ex-

pert's construction. Rog. Exp. Test. §§ 164-166; *Stilling v. Town of Thorp*, (Wis.) 11 N. W. 906; Whart. Ev. § 665. Statements of a medical book cannot go in evidence as authority on medical questions, though testimony as to what it says, if admitted, may be contradicted by producing the book. *People v. Millard*, 53 Mich. 63, (18 N. W. 562); Whart. Ev. § 665. It seems such books cannot be read in argument to the jury. *Insurance Co. v. Cheever*, 38 Am. Rep. 573 and note, 578.

The following question was propounded to Dr. Brown, but the court refused to allow it to be asked, and its refusal is pointed out as error: "Do you consider yourself an expert on death by drowning, and the appearance and conditions resulting therefrom as shown by *post mortem* examination?" No authority is given in the briefs to help us here. The question called for mere opinion, and that, too, the doctor's own opinion of his own capacity,—a very unreliable guide. Could you expect a reliable opinion on so delicate a question? He could be asked as to his professional education, practice, *etc.*, as he was, to enable the jury to judge of the worth of his evidence; but it does not seem that his own mere naked opinion of his own capacity would be admissible on even cross-examination to test his capacity. In *Boardman v. Woodman*, 47 N. H. 119, a witness was asked, as I understand, after he had been allowed to give evidence as an expert, whether he considered himself competent to give an opinion as an expert on the subject of insanity, and it was refused, and the court held that the question of competency was for the court alone, "and it is entirely immaterial what the witness' own opinion may be as to his own qualification or competency." So in *Naughton v. Stagg*, 4 Mo. App. 271. If error herein, it is by no means so material as to affect the case.

The following question, put by the State to Dr. Few, was objected to: "State whether or not, from your examination of the body, considering the character, condition, size and location of the external marks of violence, the contusions and abrasions found by you in your examination, it is your opinion that any, and, if any, what ones, of them were inflicted by the deceased, taking into consideration the external and internal condition." There are

many causes of death. Each cause has its indications pointing to it as cause. You can show the presence or absence of those indications by expert evidence. This question called for any indications of death by self-strangulation. If self-strangulation is attended with certain signs, this question called for them. If present, they would tell of self-strangulation; if not present, they would repel it. Why has not either side the right to show this? Now, if self-strangulation has, in science, any such signs, it was a proper subject of expert evidence. Whether it has or not is a proper subject of inquiry by expert evidence. If it has no indications under science, so as to call for expert evidence, then it is a matter of common experience and nature, provable by non-expert evidence; and this witness, having seen the body, could give his opinion. I think it a proper subject of expert inquiry. In *Rog. Exp. Test.* 127, it is stated broadly that experts may state their opinions as to means by which wounds were produced,—whether accidentally or not, or with this instrument, *etc.* This would justify this question.

The court refused to allow the following question to be answered, and it is relied on as error: "If the body had been removed from the water with the head depending down, and if removed from a running stream, would the absence of froth be conclusive evidence that the party did not die by drowning?" This is an indefinite, if not an irrelevant, question. What does it seek to prove? That the water, if any, in the body, would run out? If so, it should have been directed to that. But, say it meant to disprove the State's theory that, as there was no froth coming from the mouth, the deceased did not drown herself. The defense had Dr. Few's emphatic opinion in its favor on that. Just before this question was asked, the defense had asked him, "Is the absence of froth from the mouth proof that the person did not die from drowning?" He answered, "It is not." And the next question after the rejected one was, "Is the absence of froth from the mouth or nostrils conclusive evidence that the party did not die from drowning, and do not medical authorities with which you are familiar teach that the absence of froth is not conclusive that the party did not die from drowning?" and the answer, "The absence of froth at the mouth

is not evidence that they did not drown." No reason is given by the State's brief for the refusal of this question. Suppose we say it was proper, yet the other questions afforded the prisoner full means to elicit from the witness his opinion on the question whether absence of froth was conclusive evidence of drowning, and he did elicit it, and that, too, in his favor. Clearly, it would be out of all reason to say that the refusal of this question, if wrong, is so hurtful as to upturn a long trial. We see it did not—could not—hurt the prisoner.

— The court struck out certain expert evidence of Dr. Mackey, a witness introduced by the prisoner. Why, the brief for the State does not say or intimate to our help. I gather that it was because his opinions appear to be based on what "was taught and maintained by many reputable members of your profession"; and this was not admissible. But, after striking out this evidence, an elaborate examination of Dr. Mackey was accorded the prisoner upon the very matters on which the rejected evidence bore, in which he gave opinions the same as in the rejected evidence, but not based on what other professional men say, but on his own knowledge as an expert. Dr. Mackey, in the rejected evidence, stated that no ecchymoses were found beneath the pleura, pericranium, and pericardium, and that their absence told of death by drowning, as they are never found there in cases of drowning. In his continued examination which remained in the case, he stated that ecchymoses were not found beneath the pleura, pericardium, and pericranium, and that, in his opinion, that was evidence that Mrs. Musgrave came to her death by drowning, and that, in his opinion, she did so come to death. So there is plainly no error in rejecting said evidence. It is mentioned, but does not seem to be urged, in brief of counsel. See *Olfermann v. Railroad Co.*, (Mo. Sup.) 28 S. W. 742.

The State put to Dr. Hartigan, a witness for the defense, as an expert, this question, against the defendant's objection: "State whether or not, in a case where you found the condition set forth in the autopsy, and, in addition, extravasated blood of the thyroid region, you found external marks of violence on the neck,—state if these distinct and well-marked evidences of violence and force and pressure should be considered in making up a judgment or

opinion as to the cause which produced that condition of the thyroid region." The answer was, "They should." Now, this question was based on the autopsy in evidence, and on marks of violence which there was evidence tending to show,—in fact, not denied; and why such marks should not enter into the medical expert's opinion as to the cause of death I am not able to discover. *Livingston's Case*, 14 Grat. 592, says the physician may say whether, in his opinion, certain wounds would cause death. Why not, then, take them into consideration? Certain physical appearances may be taken as cause of death by experts, and they may so state. Rog. Exp. Test. 127. What if this evidence tended to corroborate the opinions of the State's experts, in whose opinions those marks were taken into consideration?

Edith Michael, a State witness, was asked on cross-examination by the prisoner whether it was not a fact that her father and the prisoner had been on unfriendly terms, and whether, as a member of his family, and as frequently visiting her father, she participated in the unfriendly feeling; and the court refused to allow her to answer. No reason is suggested to us why it might not have been allowed, and thus all question saved, and I see none, unless the source of unfriendliness was too remote. But it is too unimportant to reverse.

Asheville Snyder gave evidence to show angry conversations between the prisoner and wife on several occasions, and there was much other evidence that they frequently quarreled, and he kicked and choked her on some occasions, and she had left his house, but later returned, and, in the presence of the person who had brought her back, told her husband that she would stay with him, if he would use her half white, and he received her coldly, not speaking or shaking hands, making no response to her offer to stay. On that occasion she asked him if she could send some things to her son by a former marriage, just married, and he told her she could not; that, if she took one thing away, she took all, and herself, too. She on that occasion said she was in danger of her life living with him, and was getting her satchel to go back with the party who brought her home, when the third party persuaded her to stay. There was other evidence tending to show

that he charged her with unfaithfulness, and felt bitter towards her. There had been a quarrel between them on the morning of the day on which she was found dead in the creek, as the prisoner admitted. This witness—Snyder—was allowed to say that he had seen her a short time before her death, hurrying down the road from his home, crying, and she said to him, "You don't know what I have to contend with;" that he had seen her a number of times, crying, at the house. When she was crying as she went down the road, and said to Snyder that he did not know what she had to contend with, Musgrave was in hearing, as he was standing in his yard, and she spoke in a loud tone. The point made against this is that Snyder was allowed to make this statement without showing the presence of the prisoner; but it was shown certainly sufficiently to go before the jury.

Complaint is made that evidence was given to show that he did not cry when he saw his wife lying dead, that he did not assist in efforts to resuscitate her, that he was restless during the examination of the body at the creek, that the prisoner wanted the coffin obtained and her buried by three o'clock next day. Personal conduct of the accused, evincive of his motives and of the workings of the inner man, are always received as evidence as bearing on his guilt. Lawson, Pres. Ev. 534; Starkie, Ev. 491, 494; *Dean v. Com.*, 32 Grat. 923.

It is said the court violated the rule against leading questions. A witness said that the prisoner, while in jail, would get up out of bed and awake him, and that his eyes would look like they would jump right at the witness, and prisoner would say that he could not sleep, that he was worried, there was something on his mind; and the witness was asked this question: "What did he say, if anything, at night, when he came to your bed, about murderers couldn't sleep?" which was answered: "Yes, he said that. He said, 'Murderers can't sleep, can't rest.'" In the first place, this is hardly a leading question. It only called the attention to the particular point on which inquiry was being made. *Hooper's Case*, 6 Grat. 684; *Cluverius' Case*, 81 Va. 787. And, in the second place, effort had been made to get the witness' mind on the particular point fruitlessly before this question was asked, and that warranted it. 1 Greenl. Ev. § 435.

I have thus at too great length, in deference to the able counsel of the prisoner and of the great gravity of the case, made reference to almost all, if not all, of the many matters involving questions of law made before us in the counsel's elaborate brief, without finding any error of law to justify a reversal of the conviction of the prisoner, which came of a notable trial beginning on the 13th and closing on the 26th of June. If we could say there was any misstep in matter of law in this long trial, it is one of very immaterial character, weighing not a feather in the trial, utterly inadequate to justify the reversal of a long, laborious trial bearing to us the face of having been full, patient, and fair. The scope of harmless error is, in these days, widening. Courts do not nowadays, even in grave trials, reverse such trials for trivial errors, evidently not affecting them; so light, and plainly playing so unimportant a part, as not to be appreciably influential or prejudicial when the whole trial, all in all, is regarded. In days gone by, technicalities and rigid procedure sprang up and were enforced to defend accused parties against the demand of monarchic power for conviction, and they then answered, good purpose; but in this country there is not the same need of them, as the danger now is that the guilty will go free, and something is necessary to protect the public against crime. The great press is declaiming against the courts for lax administration of criminal law. The New York World recently stated that statistics show that for ten years past only 2.20 *per cent.* of homicides have been punished, and that the people are afraid of the courts, and for quick justice resort to lynch law; and further says that this is attributable to the laxity and languor with which the law is enforced, the quibbles, subtleties, and technicalities of the courts fortressing criminals, and causing the administration of justice to appear a mere mockery. Such, I observe, is now almost the universal expression of the press. I would not overturn the solemn verdicts of juries rendered after fair trials, and approved by the trial court, unless I could see that on the whole case something substantially wronging the prisoner had been done. I would therefore affirm.

Reversed.

CHARLESTON.

WINDON v. STEWART.

Submitted June 11, 1897—Decided November 10, 1897.

43	711
146	267
43	711
848	489
43	711
52	483

1. GUARDIAN AND WARD—*Ward's Realty—Contracts.*

A guardian may lease the land of his ward, either by private contract or public outcry. (p. 715.)

2. GUARDIAN AND WARD—*Ward's Realty—Liability of Guardian.*

If a guardian lease the land of his ward in good faith for a rental believed by him to be fair, he can not be charged with a higher rental, unless it be so inadequate as to carry the conviction of bad faith. (p. 714.)

3. GUARDIAN AND WARD—*Trustee's—Liability of Fiduciary.*

Where a guardian or other fiduciary or trustee does an act, and it is sought to make him liable for a loss consequent thereon, on the theory that his act was injudicious and improvident, if the act was in entire good faith, and the fault only an error of judgment and want of sharp-sighted vigilance, and the act be one which, as a prudent man, he might have done in his own matters, he cannot be made liable. (p. 714..)

4. TENANTS—*Liability of Tenants—Repairs—Lease.*

A tenant must make ordinary repairs to buildings, repair and keep up fences, remove and keep down filth growing on farming and grazing lands, at his own expense, unless otherwise provided in the lease. (p. 716.)

5. LANDLORD AND TENANT—*Improvements.*

A tenant can not make permanent improvements, and charge the landlord therefor, without the latter's consent. (p. 716.)

6. GUARDIAN AND WARD—*Tenants—Repairs.*

A guardian can not allow the tenant for repairs which the tenant should make, and get credit in his account against the ward. (p. 716.)

7. PARENT AND CHILD—*Maintenance.*

A father, if of ability, must support his child, and can not charge him with maintenance, though the child have estate of his own. (p. 718.)

8. GUARDIAN AND WARD—*Ward's Personal Estate—Court's Authority.*

A guardian can not, without a previous order of court, use any part of the principal of the ward's personal estate for

any purpose, and a court can only make such order for maintenance or education, not for improvement of land or other purpose. (No opinion is intended as to a child too young to be bound out.) (p. 718.)

9. SETTLEMENTS—*Surcharge and Falsify—Measure of Relief.*

Where a former settlement is surcharged and falsified, no new settlement covering and overhauling the whole transaction is to be made, but an account is made of items surcharged or falsified, and the sum of such items is the measure of relief to the party injured by the former settlement. (p. 721.)

Appeal from Circuit Court, Harrison County.

Suit by Ingaby M. Windon against William A. Stewart, as his guardian. Decree for plaintiff and defendant appeals.

Reversed.

JOHN BASSEL, for appellant.

LEWIS C. LAWSON, for appellee.

BRANNON, JUDGE:

This is an appeal from a decree in a chancery suit by Ingaby M. Windon against William A. Stewart to surcharge and falsify *ex parte* settlements made by Stewart as guardian of Ingaby M. Windon, *nee* Stewart, in which those settlements were reviewed, and a liability larger than that shown by them imposed on the guardian, and he appeals.

The first assignment of error is that the order of reference to a commissioner was improper when made, because at that time *prima facie* evidence to impugn the former settlements had not been adduced. In the first place, the last or final *ex parte* settlement was never confirmed. Again, evidence tending to show that rent for the land of the ward was too little had been given before the reference. And again, these settlements show errors on their face in allowing principal of the ward's estate to be used in improving land and in maintenance of the ward, without order of court. Under these circumstances, point 2 in *Seabright v. Seabright*, 28 W. Va. 412, would justify the reference, as it holds that, if errors appear on the settlement, even the bill need not specify those errors, but there may be at once a review of such settlement; and, more-

over, point 6 in that case holds that, even where there is no error apparent on the settlement assailed, and in a case where no reference is at the time proper, yet, if it turns out at last to have been proper from further developments in the case, the court will not, because of such premature reference alone, reverse a decree.

The second assignment of error is that the decree charged the guardian with four hundred and sixty-five dollars and ninety-six cents additional rent on the ward's land beyond that charged in the former settlements. I shall refrain from detailing under this head, or any other, the large volume of differing and conflicting oral evidence, since it is cumbersome and improper to load opinions with such evidence, as they are intended only to lay down principles of law. The guardian rented the land, in which the ward had a third interest, to the father of the ward, Robert M. Stewart, who is brother to the guardian, for five years, at one hundred and seventy-five dollars per year, and two years at two hundred dollars, and the decree charged two hundred and sixty dollars. A quantity of evidence given to show the number of cattle which the land would sustain, and probable profits therefrom, and what land was cropped, and opinions of witnesses as to the rental worth, tend to show by a preponderance that the land was worth a larger rental; but men would differ so much on such a matter, as is strikingly manifest from the estimated rent by fourteen witnesses in this case, ranging from one hundred to four hundred dollars. The commissioner did not really pass on this matter himself, but, adding the aggregate estimates of all the witnesses, and dividing by their number, took the quotient as a finding. This was held in *Thompson's Case*, 8 Grat. 637, not to vitiate a verdict, but it is hardly a proper process for a commissioner. The same reason does not apply. But the fact that it is not to be regarded as a definite finding by the commissioner is shown by the fact that, after stating the process by which two hundred and sixty dollars rental was reached, he said, "if the court adopts this as the proper amount," then a certain statement would be right, thus submitting the matter to the court. Where a commissioner finds neither way, but submits to the court, it is not such a finding as requires any exception. Only a finding needs an

exception. Hence we can not apply, as we are urged to do, the principle laid down in *Hartman v. Evans* 38 W. Va. 669, (18 S. E. 810), that every presumption is made in favor of the correctness of the decision of a commissioner in chancery, and, if the testimony is conflicting, the court rarely interferes with his finding on facts, if he makes no error of law in the result. And, if we would, we could not ignore another very just and important rule or presumption of law, and that is that a sworn fiduciary's action, if *bona fide*, or, to speak more accurately, if not appearing to be *mala fide*, is upheld, and he is not placed under a greater burden than it imposes.

When this guardian rented, he is presumed to have acted *bona fide*, and it must clearly appear that he did not, to charge him with greater rent than he received. The office of guardian is rarely lucrative, and is generally undertaken from motives of duty on account of kinship or kindness, rather than for profit, and we ought not to be so strict with them, or other trustees, where mere judgment and prudence are involved, as to strike terror into mankind when acting for others, and deter cautious, prudent, business men from taking upon themselves offices of kindness and humanity. If there is no *mala fides*, nothing wrongful in the conduct of the trustee, the court will always favor him. Trustees acting with reasonable care and prudence, and with the best judgment they can upon the occasion, will be protected, notwithstanding an unforeseen loss of the trust subject, or it may turn out not to be for the very best. See Judge Lee's opinion, *Elliott v. Carter*, 9 Grat. 557. "It is a general principle, applicable to fiduciaries of all kinds, and, among others, to guardians, that no more shall be required of them than that they act in good faith, and with the same prudence and discretion that a prudent man is accustomed to exercise in the management of his own affairs." 1 Minor, Inst. 448; *Myers' Ex'r v. Zetelle*, 21 Grat. 758. Common skill, common caution, common prudence, are all that can be required. The tract was two hundred and twenty acres farming land, of which one-third belonged to the ward. Much evidence shows it was in bad condition from filth, bad fences, etc. The guardian took the opinion of three persons, who

deemed one hundred and seventy-five dollars a fair rental. He did not rent at public renting, and this is complained of as a sign of fraud, but the law does not require a public renting. Some evidence was given that he was offered more, but he denies this, and there is some question as to the solvency of the parties offering more, and it is not clear that it was at the same time. It is said he did not seek to rent to any one but his brother. But the brother was the father of the children, and it is so natural that he should rent preferably to the father that we can hardly fault him for this. Two of the children were young girls, and no doubt all thought, as any of us would, that, as the father was of limited means, it was fair, reasonable, and not imprudent to let him have the land at a moderate rent, to help support the children, as more conducive to their interest. We must find him guilty of intentional corruption towards these children to compel him to pay them rent which he did not actually receive. The only sign of this is that the father owed this guardian a very considerable debt, and, it is claimed, designed by this cheap rental to enable him to profit by the farm so as to pay the debt. This is not a controlling or conclusive circumstance. So we think there is error in charging him beyond rent received, beyond the sum fixed in the leasing, one hundred and seventy-five dollars for seven years, and two hundred dollars for two years.

It is contended that the commissioner and court erred in charging any rent at all from the date when the land was divided, and Mrs. Windon's part set off to her, to the day of her majority. It is contended that she and her husband had possession during that period. The evidence does not show this. There is conflict here, but the preponderance is the other way. For only a few months before majority was she in actual possession, and then only of a part. The commissioner found one way, charging rent at one hundred dollars per year,—the lowest sum fixed by any witness,—and we cannot disturb the decree for this. Besides, the statute gives the guardian possession until the ward's majority. She cannot contract with him. Her husband had to support her outside her land. Under circumstances of his inability, it might be said that, as she was entitled to the rents, if she got them by possession, they might be

treated as necessities; but she was entitled to have the land rented out to yield rent, and be supported by her husband. Neither she nor her husband was entitled to possession. The guardian seems to have leased the land to his brother during the guardianship. If he was lax and negligent, and did not get rent during this period, it was his own fault, and he is chargeable with what he received, —or, by due diligence might have received. 1 Minor, Inst. 446. The guardian in this case seems to have been lax, leaving everything to his brother, and we explain this by considering the close relationship of the parties, and his supposition that all would be satisfactory; but that is his misfortune of being too liberal and trustful, and we cannot deny the legal right of the infant who, on marriage and majority, is dissatisfied, and demands rigid account according to law, as is frequently the case, often enforcing hardship.

The third point assigned as error is that the guardian is charged four hundred and ten dollars and twelve cents as principal improperly disbursed, as well as two hundred and sixteen dollars and twenty-nine cents interest thereon. This was money paid to the guardian, not from rent of land by him, and is principal. The guardian claims that it was expended in improvements on the land, and in the maintenance of the ward. The improvement on the land was cutting filth, some new fence, and a small shed annexed to the barn. The law requires a tenant for years to make repairs and keep land in tillable or pasturable condition, by removing what is commonly called filth, such as elders, briars, and like growth, unless otherwise stipulated in the lease. He must repair existing fences. He must fence with new fences, so far as may be necessary to his use of the land. *Hoyleman v. Railway Co.*, 33 W. Va. 489 (10 S. E. 816); 2 Minor, Inst. 682, 686; Tied. Real Prop. §§ 77, 189; Tayl. Landl. & Ten. §§ 327, 343. Of course, a tenant cannot build new houses, or make permanent improvements beyond what falls on himself as a duty to repair, and charge the ward for it. Tied. Real Prop. § 189; 12 Am. & Eng. Enc. Law, 720, 723. If the rent were to be thus absorbed, or it had been so agreed, it would be grossly inadequate rent, virtually giving the use of the land. Even with this it is pretty difficult to uphold the

guardian's action. It follows that this guardian had no show of right to allow the tenant a dollar for the work he claimed in cutting filth, repairing or building fences or any building, against even the rent; and less still, after thus absorbing the rent, to invade the said principal money to pay for such improvements. There is another reason why he could not, by allowance to the tenant, or by any action of his own, touch the said principal, and that is that section 8, chapter 82, Code 1891, prohibits expressly any allowance to a guardian, for any purpose, out of the principal, unless he first gets leave of the circuit court to do so. Until the act of 1882, the law was that the principal of the personal estate might be applied for the education and maintenance of the ward, without previous order of court, but at the peril of the guardian; for when he comes to settle the court must be satisfied that such expenditure was judicious and proper. This placed the guardian in a very embarrassing and dangerous condition. Often guardians were harassed by their female wards after marriage by controversy as to the propriety of expenditures honestly and in good faith made, even at the earnest request of the ward, and often suffered losses. It was, therefore, a prudent act, beneficial to ward and guardian,—that act of 1882. It closed the door upon dispute by settling it in advance by court order. It is prohibitory in terms. It prohibits any invasion of the principal without previous court order, and denies him credit therefor. It closed the door against speculation and wrong by the guardian. It denied him any discretion. He must appeal in advance to the court for leave to expend any part of the principal, giving the ward a hearing, and binding him by a decree, closing his mouth ever after against contesting the expenditure. Anyhow, so the law is writ. The character of the change by the act of 1882 leaves no room to question what the legislature meant. So this Court construed it in *Hescht v. Calvert*, 32 W. Va. 215, 23 (9 S. E. 87). We cannot say, under this act, that if the expenditure be such as a court, if asked, would have allowed, it will be allowed without previous sanction by a court: (1) Because that was the old statute, and this act changed that; (2) because the act is in terms prohibitory of such expenditure, and in words requires a previous appli-

cation to court; (3) because it would open the door to a discretion by the guardian liable to abuse and destruction to the ward's estate, and fruitful of litigation between guardian and ward; (4) because it would deny the ward a hearing before the expenditure touching its propriety,—a safeguard given by the act,—and take from him the still more important safeguard to him of having a court, in advance, pass on the wisdom of the expenditure. And we can realize that a court would often refuse to sanction in advance an expenditure which, after it would be made, it would, out of tenderness to the guardian, hesitate to make him lose. This would not carry out the design and policy of the legislature. A question may arise whether this requirement of a previous court order is applicable to an infant too young or infirm to be bound out, under clause 1, s. 8, c. 82. I express no opinion on this question. In no view could any of the principal be allowed, by a court or guardian, for repairs or improvements, because the statute allows this only for maintenance or education. Appellant's counsel argues with emphasis that, if it was proper to charge the said sum of principal as improperly expended, it was surely improper to charge interest upon it. If the expenditure had been proper, the interest could be applied, but for reasons stated above the expenditures were unwarrantable. The tenant had no claim to payment for the work he did. And if it be said that the guardian could apply it to maintenance, I answer that he could not do so, for reasons which I will give under the fourth assignment of error. The principal being chargeable, interest followed of course; and then, in fact, it is a question of allowance for improvements and maintenance as set-off or credit, rather than a question of whether interest is chargeable.

The fourth assignment of error is that the decree charges the guardian with one hundred and fifty-six dollars and fifty-four cents, and interest thereon, as improperly credited to the guardian in the former settlements, for boarding and clothing his ward. The ward was thirteen or fourteen years of age, when the guardianship commenced. Her father was a large, stout man, engaged in farming, and later in butchering and storekeeping in Clarksburg. He was in middle life, and in active business. He

was neither poor nor rich; but he owned a house, horses, cows, farming utensils, and means of business, and was capable of making, and did make, a living for his family. The guardian trusted him for five years' rent without security. The law, as well as affection, put on him the burden of supporting his child, even though she had estate. *Evans v. Pearce*, 15 Grat. 513; *Griffith v. Bird*, 22 Grat. 73; 1 Minor, Inst. 456. Besides, this evidence shows that she performed services in the family equal in value to her board and clothing. Therefore it was proper to disallow pay therefor.

Appellee's counsel cross assigns error in that the guardian is charged with one-third instead of one-half a certain sum of three hundred and nineteen dollars. The mother of these Stewart children, as legatee of one Devers, was entitled to certain money, and Devers' executor gave her a note therefor, and on her death, supposing the children entitled to all of it, not regarding the husband, as he was, entitled to a third as a distributee of his wife, took up this note, and gave his note to this guardian of Mrs. Windon and her sister, and when this new note was paid, Stewart, the guardian, paid one-third to Robert M. Stewart, as husband of his deceased wife, and accounted to Mrs. Windon for only a third of the money. The first question is, had the husband any claim against the guardian,—any legal demand? The administrator of the wife was the one to collect the note given her, and out of it pay the husband one-third and the balance to the children, and his demand was against the administrator. The husband, through her administrator, could still look to her debtor, the payment to the guardian not being good against him. But the guardian did, in fact, receive money from a debt, part of which belonged to the husband, and I suppose the distributee can follow it into the guardian's hands, without calling on his wife's administrator to do so. If one of two distributees equally entitled receive from the administrator of a decedent a sum belonging to both, I should say that the other could sue either the administrator wrongfully paying to one, or sue the distributee receiving the whole, for money had and received to his use. Is it different where a guardian receives? I suppose if a guardian or other trustee or fiduciary, receives money to which his

cestui que trust is not entitled, money which ought not to have gone into his hands, he may pay it to the one entitled. The *cestui que* trust is not entitled to it.

But counsel bases his position on the theory that, when the guardian paid to the husband, his claim as distributee of his wife had become barred by limitation. He wants to count from the death of Mrs. Stewart, saying that then his right as distributee accrued. This is not tenable. That might be as against Devers' estate, less one year, but not as to a demand for money had and received by the guardian. Did the statute of five years begin on February 21, 1884, when the old note was settled by a new note to the guardian? If so, the demand is barred, and the guardian could not pay a barred demand, as section 5, chapter 87, Code 1891, says a guardian paying a barred demand shall have no credit for it. That new note was a payment for some purposes, perhaps, but not, I think, such payment, as between the husband and guardian, that we can say that the husband could then sue, as no money was then actually paid to warrant him in suing for money had and received to his use. His action accrued only on actual collection. In this view, the demand was not barred, and there is no ground for this cross assignment of error.

Appellee excepts to the report because it allowed for improvements. This exception was well taken, for reasons above given. The report charges the increased rent at two hundred and sixty dollars one-third being eighty-six dollars and sixty-seven cents, and credits the guardian with fifty-eight dollars and thirty-three cents, the third of rent of one hundred and seventy-five dollars, thus allowing the guardian for improvements; and the ward loses this, unless the charge of four hundred and ten dollars and twelve cents for improper disbursements, operates to repair this loss. No improvements or repairs are to be allowed. Appellant claims that, as there is a charge of four hundred and ten dollars and twelve cents for money received and improperly disbursed, and a charge for two hundred and fifty-six dollars and thirty-six cents improperly allowed for board, he is doubly charged, and he pays this two hundred and fifty-six dollars and thirty-six cents twice. If that four hundred and ten dollars and twelve cents be items improperly credited the guardian in the former settlement,

and the two hundred and fifty-six dollars and thirty-six cents separate and distinct therefrom,—all improper charges,—I see no double charging. If a guardian were charged with money received, charged in former settlement, and also charged with an item improperly allowed the guardian in former settlement, it would be a double charge of the latter item. I do not so understand this. In view of a further account, I will remark that when a bill surcharges and falsifies a former settlement, you do not make a new account covering and overhauling the whole transaction, but you make an account embracing items found improperly omitted and allowed in the former settlement,—that is, items surcharged or items falsified,—items surcharged being those which should have been, but were not charged in favor of the party attacking the settlement, and items falsified being those improperly charged against him in the former settlement. You simply correct the former settlement by giving him their benefit. Their sum, with proper inclusion of interest, is the measure of his relief. *Shugart v. Thompson*, 10 Leigh, 434. Reversed and remanded.

Reversed.

CHARLESTON.

KANAWHA COAL CO. v. BALLARD & WELCH COAL CO. *et al.*

(BRANNON, JUDGE, *concurring.*)

Submitted February 11, 1897—Decided November 11, 1897.

1. CORPORATIONS—*Insolvent Corporations—Receiver.*

Where a corporation is insolvent, and is the lessee of a coal mine, and the said insolvent lessee is largely indebted to its lessor for royalty reserved in the lease, which is secured by a lien on the lease and personal property and appliances in use about the mine by the lessee, and several of the creditors of such lessee have proceeded by way of attachment, and are proceeding, to seize and scatter the personal property belonging to said lessee, and to remove the rails from the tracks

43	721
68	509

43	721
68	384

and wire ropes from the drums, a court of equity, on proper application made by such lessor, will appoint a receiver to take charge of said property. (p. 728.)

2. CORPORATIONS—*Stockholders—Stockholder as Defendant.*

A stockholder of a corporation can not be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant, for the purpose of protecting from unfounded and illegal claims against the company his own interest and the interest of such other stockholders as choose to join him in the defense. (p. 731.)

3. CORPORATIONS—*Stockholders.*

An individual stockholder is not, by reason of being a stockholder, a part owner of the property of the corporation, or entitled to act for it as its agent; but he stands as a stranger towards it, and may sue it and be sued by it and deal with it at arm's length. (p. 731.)

4. CORPORATIONS—*Receiver—Appointment of Receiver.*

In order to obtain the appointment of a receiver, the plaintiff must show—first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund, to which he has a right to resort for the satisfaction of his claim; and, secondly, that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant. (p. 732.)

5. EQUITY PRACTICE—*Commissioner's Report—Decree.*

Under section 7, chapter 8, Acts 1895, if a decree is entered on a commissioner's report before the term next after the term at which the same was filed, such decree is so entered at the risk of a party excepting and showing error within the time given by statute. (p. 734.)

Appeal from Circuit Court, Kanawha County.

Action by the Kanawha Coal Company against the Ballard & Welch Coal Company and others for an injunction and the appointment of a receiver. There was a decree for plaintiff, and defendants appeal.

Affirmed.

E. W. WILSON, for appellant.

BROWN, JACKSON & KNIGHT, for appellee.

ENGLISH, PRESIDENT.

On the 8th day of March, 1895, the Kanawha Coal Company, a corporation, presented its bill to the Circuit Court of Kanawha County praying an injunction against the Ballard & Welch Coal Company and others, to prevent them taking up the rails and moving the fixtures or otherwise disposing of the personal property upon the leased premises in the bill mentioned, or that might have been taken from said premises within thirty days next prior to that date, and also praying for a receiver of the defendant the Ballard & Welch Coal Company; and thereupon the court awarded the injunction prayed for, to take effect upon the complainant or some one for it executing a bond before the clerk of said court, with good security in the penalty of five hundred dollars, conditioned to pay all costs and damages which would be awarded in the event of said injunctions being dissolved, and the motion made for a receiver was set down for consideration and hearing on the 9th day of March, 1895.

On that day, on motion of the complainant, O. A. Veazey was appointed receiver of said Ballard & Welch Coal Company, and all of its assets and business; and said receiver was directed to take immediate charge of all the assets, business, and property, of every kind and description, belonging to said Ballard & Welch Coal Company, wheresoever the same might be found, and to collect all indebtedness due said company, keeping a strict account thereof, and to keep, care for, and preserve all of the other property of said company until further order of the court; and the defendants to the suit, having any other property of said company in their possession or under their control, were directed forthwith to turn the same over to said receiver, together with a statement of the claim under which they held the same, which claim they should have the right to present to and have passed upon by the commissioner to whom the cause was referred; and the said receiver was authorized to employ counsel and such necessary help as might be required for the full discharge of his duties in the premises.

By consent of complainant and defendant the Ballard & Welch Coal Company, the cause was referred to Joseph Ruffner, who was appointed a special commissioner for the

purpose to take, state, settle and report an account of the assets and liabilities of the defendant the Ballard & Welch Coal Company, showing to whom said company was indebted, the amount due each creditor, and the liens, if any, their priorities upon the property of said company, together with any other matter or things that to the commission may seem pertinent or any party may require. These decrees were made in pursuance of the allegations of the bill filed by the Kanawha Coal Company, as before stated, in which said company claimed to be the owner in fee of a valuable coal property, situated on the Kanawha river, between Cabin creek and Paint creek, and alleged that, being so seised and possessed on the 26th of September, 1893, it demised the same to G. L. Welch, upon certain terms and conditions set forth in said lease; that on the 12th of September, 1894, said Welch, by apt and proper deed, in which the plaintiff united, transferred and assigned, with the consent of the plaintiff, all of the rights and benefits under said lease to the defendant the Ballard & Welch Coal Company, who also united in said deed, and assumed the covenants and agreements in said first deed contained on the part of said Welch; that, under said first deed, said G. L. Welch immediately took possession of said premises, and, upon the execution of said second deed, said Ballard & Welch Coal Company succeeded the said Welch, and took possession of said premises, and had until the last few days been operating the same as coal property, mining and shipping coal therefrom; that, during the possession under said lease, the said lessee and assignee placed upon said premises sundry items of property liable to distraint for rent, as well as other items of property which in their nature and character became part of the freehold; that there was on said premises, until within thirty days next preceeding that date, the following property, to wit, blacksmith shop and tools, pump boat, fuel boat, wire rope, three houses for miners, stable, seven mules, two horses, a lot of T rails, side tracks, fifty-six mine cars, crap on tippie, wagons and harness, powder house, office furniture, a lot of ropes and lines, miners' tools, window sash, roofing iron, hay and corn, household and kitchen furniture, one cow, six set of car wheels, a lot of grate bars, a stock of goods, wares, and merchandise, lot of lumber and timber,

coal scales, screen bars, and other tools and appliances, and property used in and about said coal plant, a considerable part of which was on said premises from the date of said lease, and is the property of complainant, upon all of which property plaintiff had a lien duly recorded, which lien was still in force; that, by the terms of said lease, the plaintiff is entitled to a minimum royalty of rent on said premises of three thousand dollars: that on January 1, 1895, there remained unpaid of rents a balance of one thousand six hundred and sixty-two dollars and forty-five cents, payable in thirty days from that date, upon which there was to be credited, when collected, the sum of five hundred and seventy-seven dollars and seventy-three cents, on account of an order given by the said defendant company upon the cashier of the C. & O. Railroad Company; that, since said 1st of January, the royalties had accrued, amounting to five hundred and fifty dollars additional, none of which had been paid; that said Ballard & Welch Coal Company had become hopelessly insolvent, and its creditors were attaching and levying upon the property of said company upon said premises, and removing the same, and were threatening to tear loose from said premises the rails, wire ropes attached to the drums, connected with the incline and tippie on said premises, and other fixtures attached to said leasehold estate, and, unless restrained, will execute said threat, and greatly damage said leasehold estate, as well as said property, and destroy the value thereof.

The plaintiff then proceeds to designate several creditors of said defendant company who have sued out attachments for various amounts, and levied them upon property on said leased premises, and others who have obtained judgments and levied executions upon said property, by reason of which the property of said company would be scattered, sacrificed, and dissipated to such an extent that it will have nothing out of which to collect the rents due it as aforesaid, and becoming due it under said lease; that, by the terms of said lease, the plaintiff has a lien for and is entitled to collect out of said property by dstraint, as well as by the enforcement of the lien reserved therefor in said deed of lease, rents and royalties for the amount not exceeding one year's rent at this time, to wit, three thousand

dollars in all, which rent is due and coming due, as set forth in said lease and in the allegations in the bill made; that, by reason of insolvency of said defendant company and the acts of said creditors, it is impossible for the said company to continue business or pay its indebtedness, and that any further efforts in that direction would result in a greater loss to complainant and the other creditors of said company; that the constable, by authority claimed under said attachment, has taken possession of certain property mentioned in Exhibit No. 3, and has removed and is removing a large part of it from the premises, and the mules especially were brought to Charleston, and are being kept at heavy expense, which expense will soon consume their value, and leave nothing for the creditors. The plaintiff further alleges that the defendants Noyes & Co. and the defendant Beane are making some claim to part of the property, and especially some of the rails attached to the freehold, the nature of which plaintiff had been unable to learn; and, under said claim, the last-named defendants were tearing up said track, and greatly injuring the freehold, upon all which property the plaintiff had a lien for its rent, except that part which becomes, by the terms of the lease, part of the freehold and the property of the complainant; that such removal is destructive to the value of the property as a coal plant, and in either event a great detriment to plaintiff; and it prays that said Noyes & Co. and Beane be required to make discovery, and say what is the nature of their claim. The plaintiff further alleges that said leasehold estate is a coal property, which requires constant care and attention to prevent injury by the accumulation of water and falling of slate, and a considerable part of the personal property, especially cars and mules, are necessary for the purpose of preventing great injury from the causes aforesaid, and, by the removal thereof and the lack of same, irreparable injury is being caused to the freehold estate; and it prayed the appointment of a receiver to take possession and charge of the assets and business of said defendant corporation, and safely keep the same until disposed of by the order of the court, and to care for and preserve the plant of the said defendant company from injury, from neglect or other cause, and that a speedy sale might be made of said prop-

erty, and that the cause be referred to a commissioner to ascertain and report an account, showing the assets and indebtedness of said company, to whom said indebtedness is due, and how much to each creditor, and the liens and priorities of the defendant company; that the creditors be convened before said commissioner, and required to present their claims and have the same adjudicated; that plaintiff's claim may be decreed to be a first lien upon the property of said company, and that the same be enforced; that the defendants be enjoined from further interfering with the property of the said defendant on said leased premises, or removed therefrom within thirty days next preceding that date, and from otherwise interfering with said property; and that those defendants having any portion thereof in their possession may be required forthwith to deliver the same up to said receiver.

As we have seen, an injunction was awarded on the 8th of March, 1895, and a receiver appointed in pursuance of the prayer of the bill; and on the same day, by consent of the complainant and the defendant the Ballard & Welch Coal Company, the cause was referred to Joseph Ruffner, to report upon the matters above stated. The commissioner returned his report on the 2d of July, 1895, which was excepted to by the plaintiff; and on the 27th of August, 1895, the defendant G. L. Welch demurred to the plaintiff's bill, which demurrer was overruled; and thereupon he tendered an answer purporting to be in behalf of himself and all the stockholders of the Ballard & Welch Coal Company similarly situated, and on behalf of said company, to the filing of which answer the plaintiff objected, which objection was sustained by the court, and said answer was not allowed to be filed, and the defendant G. L. Welch objected and excepted; and thereupon, after tendering the answer aforesaid, the said Welch moved to discharge the special receiver appointed in the cause, which motion the court overruled, and said Welch again objected and excepted; and thereupon the court proceeded to decree what property of the defendant company was subject to sale, and the amount and priorities of the liens thereon, in whose favor they existed, and provide that, unless the Ballard & Welch Coal Company, or some one for it, should within thirty days pay to its creditors the

several amounts therein specified, and the costs of the suit, then special commissioners therein named should proceed to sell said leasehold estate and improvements and loose personal property at public auction, upon the terms and within the manner therein specified; and from this decree the said G. L. Welch, acting on his own behalf, and on behalf of all other stockholders similarly situated, and on behalf of the defendant the Ballard & Welch Coal Company, obtained this appeal.

The errors assigned and relied upon by the appellant are as follows: (1) Granting the injunction; (2) appointing the receiver; (3) overruling petitioner's demurrer; (4) refusing to allow said answer to be filed; (5) overruling motion to discharge receiver; (6) in entering a decree on the commissioner's report before the term next after the term at which the same was filed, thereby depriving defendants of their right to exception secured by section 7, chapter 8, Acts 1895; (7) decreeing the liability and payment of accruing royalty under the lease filed with the bill, after granting the injunction to the complainant lessor.

Did the court err in overruling the defendant's demurrer? Now, the effect of the demurrer was to admit the allegations of the bill which were properly pleaded to be true; and, looking at the allegations of the bill which are hereinbefore set forth, we must conclude that the facts therein stated are sufficient, if true, to entitle the plaintiff to equitable relief. It alleges the existence of its large claims for royalty against the defendant corporation; that the same is due and unpaid; that the corporation is insolvent; and that various creditors are not only seizing the personalty of the corporation to satisfy their debts, but are actually tearing up the iron rails from the railroad tracks leading to the mines, and dismantling the property of the wire ropes and various appliances used in the daily operations at the mines. It is true that this Court held in the case of *Ruffner v. Mairs*, 33 W. Va. 655 (11 S. E. 5), Syl. point 1, that "a court of equity should exercise extreme caution in the appointment of receivers on *ex parte* applications, and be careful that a proper case is presented before adopting this extraordinary procedure; and it should not be done without notice to the party whose property is

to be affected, except in cases of the greatest emergency, demanding the immediate interference of the court." In this case no answer was attempted to be filed by the defendant Welch before the order was made appointing a receiver. The allegations of the bill sworn to by the attorney for the defendant company present such a state of facts as would authorize the appointment of a receiver. They have already been detailed, and it is useless to repeat them here. It is true, the plaintiff had reserved on the face of the lease to G. L. Welch, the right, if any of the rents or royalties should remain due and unpaid for sixty days after the same were payable as therein provided, to distrain, by landlord's warrant, not only all personal property contemplated by the laws of West Virginia, but also all the improvements that might have been put upon said land and the leasehold created by such lease, which royalties were made a first lien and charge upon the leasehold estate, and upon all buildings and improvements erected thereon by said lessee, and upon all the property of said lessee upon said demised premises, which lien, in case of default in payment of rents for the period of sixty days, might be enforced in any court having jurisdiction thereof. It appears by the allegations of the bill that the defendant company was insolvent; that its personal property was being seized and removed from the property under attachments, and the property was being dismantled of its various equipments and appliances as a coal property, and immediate action was required on the part of the plaintiff by the assertion of his liens, and the appointment of a receiver was necessary to prevent the property of the defendant from being seized and scattered, and the plaintiff's remedy for his rent defeated. No answer was filed by the defendant company, although it appears that due notice of the motion to appoint a receiver had been given said company; but, on the contrary, the defendant the Ballard & Welch Coal Company appeared and consented that the cause be referred to a commissioner to ascertain and report and account the assets and liabilities of the defendant company, the liens against the same, and their priorities.

The defendant G. L. Welch tendered an answer on his own behalf, and on behalf of all other stockholders of said

company similarly situated, and on behalf of said company, which was rejected; and this action of the court is claimed by the appellant to have been erroneous. Did the court err in rejecting the said answer? The defendant G. L. Welch does not appear to have been authorized in any manner to answer for the Ballard & Welch Coal Company, and, besides, said company could only answer, if it was disposed so to do, under its corporate seal. See 1 Bart. Ch. Prac. 174; Story, Eq. Pl. § 235. In the case of *Park v. Petroleum Co.* 25 W. Va. 108, it was held that "a corporation must defend a suit brought against it in its corporate name; and a purchaser of stock will not be permitted to do so unless the corporation has refused to defend." JOHN-SON PRESIDENT, in delivering the opinion of the court, says, on page 111: "It is well settled, from the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural person, who procured its creation and had pecuniary interests in it, in which all its property is invested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for the corporate purposes, by its corporate name. The corporation must transact its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation." In the case of *Bronson v. Railroad Co.*, 2 Wall. 283, Syl. point 1, it was held that "stockholders of a corporation cannot be regarded as answerable for the corporation itself; in a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant, for the purpose of protecting from unfounded and illegal claims against the company his own interest and the interest of such other stockholders as choose to join him in the defense." Mr. Justice Nelson, in delivering the opinion of the court, on page 302 says: "A further objection to the practice of permitting a party to appear and answer in the name of the corporation is the

inequality that would exist between the parties to the litigation. The corporation not being before the court, it would not be bound by any order or decree rendered against it, nor by any admissions made in the answer, or stipulations that might be entered into by the parties or their counsel. * * * It is insisted, however, that the directors of this company refuse to appear and defend the bill filed against them, and for the fraudulent purpose of sacrificing the interest of the stockholders; and hence the necessity, as well as the propriety and justice, of permitting the defence by a stockholder in their name. Undoubtedly, in the case supposed it would be a reproach to the law, and especially in a court of equity, if the stockholders were remediless. But in such a case the court, in its discretion, will permit a stockholder to become a party defendant for the purpose of protecting his own interest against unfounded or illegal claims against the company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defense. But this defense is independent of the company and its directors, and the stockholder becomes a real and substantial party to the extent of his own interest and of those who may join him." See, also, 4 Thomp. Corp. § 4478, where it is said: "So, the general rule is that the shareholders will not be permitted in a suit in equity against a corporation to appear and answer the bill for the company, since the company would not be bound by any order or decree rendered against it founded on the admissions of such an answer or upon any stipulations which such parties might undertake to make for it." In section 4476 the same author says: "We have already seen that the individual stockholder is not, by reason of being a stockholder, a part owner of the property of the corporation, or entitled to act for it as its agent, but that he stands as a stranger towards it, and may sue it and be sued by it, and deal with it at arm's length."

It is contended by the counsel for the appellant that a receiver should not be appointed when the legal remedy is adequate,—citing High, Rec. § 403, *etc.*; also, 20 Am. & Eng. Enc. Law, p. 18, *etc.* In the first citation, High, in speaking of judgment creditors, says: "The plaintiff must have fully and completely exhausted his remedy at

law for the collection of his judgment before he is entitled to a receiver in equity." And it is said on page 20 of the 20 American & English Encyclopædia of Law that "the power to appoint a receiver is of high and unusual character, and it must be a strong case which will justify this ultimate resort to a court of equity; nor is the power ever exercised where it is likely to produce irreparable injustice or injury to private rights, or where there exists any other safe or expedient remedy." On the next page, however, it is said: "In order to obtain the appointment of a receiver, the plaintiff must show—first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and, secondly, that the possession of the property by the defendant was obtained by fraud, or that the property itself or the income arising from it is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant." In the case we are considering, it appears that several of these requirements exist. The plaintiff has a lien upon the property. It has a right to resort to the property for satisfaction; and, again, it appears that the property was in danger of loss. So, again, on page 11 of the same volume of the Encyclopædia of Law, it is said: "The purpose of a receiver's appointment is the protection of the subject of litigation. Receivership is one of those remedial agencies devised originally in order to preserve the fund or thing in question from removal beyond the jurisdiction, or from spoliation, waste, or deterioration pending the litigation, so that it might be appropriated as the final decree should appoint. By means of the appointment of a receiver, a court of equity takes possession of the property which is the subject of the suit, preserves it from waste and destruction, secures and collects the proceeds or profits, and ultimately disposes of them, according to the rights and priorities of those entitled." In the case under consideration, the facts alleged in the bill, and sworn to, made such a case as would entitle the plaintiff to the appointment of a receiver, to take possession of the property which was being seized and scattered by the creditors of the defendant corporation. The plaintiff, under his contract with the de-

fendant Welch, was entitled to the first lien on this property, and, as we think, had the right to the appointment of a receiver to prevent the same from being scattered and dissipated by creditors who had acquired subsequent liens, by attachment and otherwise. The defendant company, being unable to satisfy these subsequent liens, made no opposition to the appointment of a receiver at the instance of the plaintiff, and has made no motion to discharge the receiver. Recognizing the fact that it was insolvent and unable to meet its liabilities, it consented to a reference to a commissioner to ascertain the amount and priorities of the liens against it.

Our statute (Code, c. 133, s. 28) provides that "a court of equity may, in any proper case pending therein in which the property of a corporation, firm, or person is involved, and there is danger of the loss of the misappropriation of the same, or a material part thereof, appoint a special receiver of such property or of the rents, issues and profits thereof or both, who shall give bond with good security to be approved by the court, * * * but no such receiver shall be appointed of any real estate or of the rents, issues or profits thereof until reasonable notice of the application therefor has been given to the owner or tenant thereof." Upon the facts stated in the bill, in pursuance of the requirements of this statute, the defendant corporation thought it advisable to make no defense under the circumstances. The defendant Welch, however, being dissatisfied with the course pursued by the defendant company, sought to file an answer for it, without in any manner being authorized so to do, which, as we have seen, he could not do under the circumstances of this case. Where a corporation is sued, it would never do to allow the individual stockholders to make separate defenses, for the reason, as suggested by the appellees, that every stockholder might have a different view as to what course should be taken. A corporation acts through its board of directors, and the directors in this instance seem to have given the defendant Welch no authority to appear and answer for them or for the company. Defendant Welch, in the answer he proposed to file, claims that Ballard, the president, neglected his duty as such, in failing to answer the bill. He does not dispute the plaintiff's claim for royalty

set up in its bill, except that he claims that royalty should not be allowed during the continuance of the injunction awarded in the cause. He denies that the company was insolvent, and says the company could and would have met its obligation without serious difficulty but for the fact that these proceedings were instituted, and for the further reason that Ballard became president, treasurer, and salesman of the defendant company, and, as such, sold coal to the amount of four thousand one hundred and two dollars and fifty cents, which he has made no return for, and he prays that said Ballard be made a party defendant, and required to answer and account for said funds. These allegations of the answer tendered by the defendant Welch, as it seems to me, have a tendency to introduce new and distinct matters which were not embraced in the original bill, and to create issues which were not contemplated by the original bill, and are not proper subjects for a cross bill. Barton in his *Chancery Practice* (volume 1, p. 301), in speaking of cross bills, says: "It should not introduce new and distinct matter, not embraced in the original bill, and it should not make new parties; for as to such matters it is an original bill, and the new matter cannot properly be examined at the hearing of the first suit." So, in the case under consideration, it would be improper to require the plaintiff in the original suit to delay his proceedings until the matter suggested by the defendant Welch's answer could be settled and adjusted between him as an individual stockholder and the treasurer of his company, who, as he claims, has been guilty of fraud and unfairness in collecting the proceeds of coal, and accounting for the same to the defendant company; and, as we think, the circuit court committed no error in rejecting the answer tendered by said defendant Welch.

The sixth assignment of error is claimed to have been in entering a decree on the commissioners report before the term next after the term at which the same was filed, thereby depriving defendants of their right to exception secured by section 7, c. 8, Acts 1895. The question raised by this exception was presented to this Court in the case of *Findley v. Smith* (decided Nov., 1896) 26 S. E. 370; and in point 5 of the syllabus in that case it was held that, if a decree was entered before the time of filing exceptions ex-

pired, it was at the risk of a party excepting and showing error within the time given by statute. In this case, however, the defendant has, by exception to said report or otherwise, shown no error to his prejudice therein, and cannot be heard to complain. The decree complained of is therefore affirmed, with costs and damages.

BRANNON, JUDGE: (*concurring*).

I do not deny the point so strenuously urged at the bar, and properly urged, that receiverships ought to be resorted to only in plain and extreme cases, where no other remedy is available, and the necessity of a receivership is manifest. Receivership is a very drastic and ruinous remedy. It destroys at one fell blow, in nine cases out of ten, the firm or corporation subjected to it. I hold decided ground under this head, but I assent to this decision for two reasons: *First*. This is not the case of a pure receivership, where the appointment of a receiver is the direct and primary object; but it is the case where the plaintiff had a lien reserved in his lease, and had the right to file a bill to enforce it, and the appointment of a receiver is merely incidental to the main relief. It is easier to justify an appointment of a receiver to save property pending suit to enforce a fixed lien than where it is not a suit to enforce a lien. It is then only a prudent step to save the lienor's security to answer his decree. *Second*. I do not think that Welch has a right to make the defence he seeks. The corporation did not resist the case.

Affirmed.

CHARLESTON.

WEIMER *et al.* v. RECTOR *et al.*

Submitted June 8, 1897—Decided November 11, 1897.

1. JUSTICE OF THE PEACE—*Summons—Misnomer—Waiver.*

A misnomer in a justice's summons is amendable, and is waived and cured by appearance and plea to the action. (p. 736.)

2. PARTNERSHIPS—*Judgment.*

A judgment against the individual members of a firm on a firm liability is not erroneous for failure to set out the firm name. (p. 737.)

43	726
150	150
43	735
62	490
43	735
164	504

Error to Circuit Court, Taylor County.

Action by Weimer, Wright & Watkins against W. A. Rector and E. L. Rector. Plaintiffs had judgment. Defendants bring error.

Affirmed.

J. G. ST. CLAIR, for plaintiffs in error.

JOHN H. HOLT, for defendants in error.

DENT, JUDGE :

At the September term, 1893, of the Circuit Court of Taylor County, Weimer, Wright & Watkins obtained a judgment against William A. Rector and Emory L. Rector for the sum of two hundred and thirty eight dollars and fifty-nine cents, with interest and costs; being an affirmation of the judgment of a justice of the peace. Defendants, on writ of error to this Court, claim that the judgment was erroneous, for the reasons: (1) That the suit was brought, as shown by the summons, in the name of Weimer, Wright & Co., while the judgment is taken in the name of Weimer, Wright & Watkins; (2) that the defendants were sued as a partnership, and the judgment is against them individually; (3) insufficiency of the evidence to warrant a judgment.

As to the last objection, it is sufficient to say that the evidence is not made a part of the record, nor anywhere appears therein.

The first objection, while urged as showing a suit by one firm, and a judgment in favor of another, simply shows a misnomer, to which no objection was made before the justice, nor in the circuit court, but clearly appears to have been waived. Section 14, chapter 125, Code, provides that "no plea in abatement for a misnomer shall be allowed in any action, but in a case wherein, but for this section, a misnomer would have been pleadable in abatement, the declaration and summons may, on motion of either party, and on the affidavit of the right name, be amended by inserting the same therein." This section applies alone to actions in the circuit court, and is quoted here simply to show by analogy to what extent pleadings are amenable in a justice's court. Clause 10, s. 50, c. 50, Code, provides,

"The pleadings may be amended at any time before the trial, or during the trial, when by such amendment substantial justice will be promoted." This necessarily includes the correction of a misnomer showing a variance between the summons and complaint, or the contract sued upon. *O'Connor v. Dils*, 43 W. Va. 54, (26 S. E. 354). But no objection was made to such misnomer, and the defendants appeared and pleaded to the action in total disregard thereof, both before the justice and in the circuit court, the only plea entered being that of payment; thus admitting the original cause of action, and waiving the misnomer, which appears in no place except in the summons. Therefore, if there might have been any force in such objection if urged in time, other than to compel an amendment of the summons, the appearance and plea to the action cures the same, as thereby the summons is rendered *functus officio*, and the further proceedings in the right name will be regarded an amendment thereof.

The judgment against the partners individually, in disregard of the partnership name, is not an error of which they can complain, for the reasons given in the case of *Courson v. Parker*, 39 W. Va. 521, (20 S. E. 583). Partners are jointly and severally liable for partnership obligations, and judgment may, in a proper case, be taken against them jointly or severally. There being no error to the prejudice of the defendants, the judgment is affirmed.

Affirmed.

CHARLESTON.

COLEMAN *et al.* v. PARRAN *et al.*

Submitted September 3, 1897—Decided Nov. 13, 1897.

1. RESULTING TRUST—*Express Trust—Declaration of Parties.*

A resulting trust being a mere creature of equity, it cannot therefore arise where there is an express trust declared by the parties, and evidenced by a written declaration of such express trust. (p. 752.)

48	737
48	734
43	737
57	488

2. TRUSTS—*Express Trust.*

Where a trust is express, implications are thereby excluded. (p. 755.)

Appeal from Circuit Court, Hardy County.

Bill by R. L. Coleman, Emma P. Coleman, and William S. Parran against Nina A. Parran and others, in equity, for partition and sale of land. Plaintiffs had a decree and the defendants, J. C. Parran and W. V. D. Parran appeal.

Affirmed.

R. W. MONROE and J. T. HOHN, for appellants.

H. S. CARR, BENJ. DAILEY, and M. W. GAMBLE, for appellees.

McWHORTER, JUDGE :

At December rules, 1891, R. L. Coleman, Emma P. Coleman, and William S. Parran filed their bill in equity in the Circuit Court of Hardy County, against Nina A. Parran, widow; D. T. Parsons, W. V. D. Parsons, John C. Parran, Martha Barbee, and Samuel Barbee, defendants, alleging that the said parties plaintiffs and defendants are the heirs at law and widow of N. D. Parran, who, in 188—, died seised and possessed in fee simple of several valuable tracts of land, situate in said Hardy County, on or near the South fork of the South branch of the Potomac, consisting of three hundred and ten and one-half acres conveyed by John Stump to said N. D. Parran, by deed dated August 31, 1852, and the same tract on which N. D. Parran resided at the time of his death, which deed from Stump to Parran is exhibited with the bill; also, a tract of seventy and three-fourth acres, which was assigned to said N. D. Parran in the chancery cause of *Custer Bryan v. Godfrey See and others*, which said assignment is of record in said Hardy County Court clerk's office, and a copy thereof exhibited with the bill; also, a tract of two acres adjoining the seventy and three-fourth-acre tract, conveyed to said Parran by Charles Lobb, special commissioner, by deed dated on the 27th of April, 1875, recorded in said office, and a copy thereof exhibited with the bill; also, a tract of fifty-eight acres, lying on Middle Mountain, but plaintiffs, not being able to find deed for same, could not locate the

tract; alleging that said real estate is not susceptible of partition, but that it would be greatly to the advantage of all the heirs to have it sold, and the proceeds divided among those entitled to it; and praying that said land be decreed to be sold, and after assigning to Nina A. Parran, the widow, her dower therein, the proceeds be distributed to the parties entitled thereto, and for general relief. The widow, Nina A. Parran, answered the bill, setting up her rights as widow, agreeing to the sale of the lands, and to accept a gross sum of the proceeds in lieu of dower, and averring that a part of said lands are agricultural lands, and should be rented out under an order of the court until such time as an advantageous sale could be made.

The defendants John C. Parran and D. T. Parsons and W. V. D. Parsons, his wife, filed their joint answer, in the nature of a cross bill, admitting the death of N. D. Parran; that at the time of his death he was in possession of and occupying the several tracts of land mentioned in the bill, and sought to be partitioned, but denying that decedent owned it in fee; averring that respondents John C. Parran and W. V. D. Parsons (formerly Parran) were the only children of said N. D. Parran, deceased, and his wife, Adaline Louisa (*nee* Craigen); that their mother was the daughter of John Craigen, who departed this life in the latter part of the year 1826, leaving a will, which was probated in Hardy county on the the 9th of January, 1827, and exhibited a copy thereof; that John Craigen devised his home place and four tracts of woodland to said Adaline Craigen, afterwards Parran (said respondent's mother), for and during her natural life, and after her death to the issue of her body, and in default of any issue, then to the rest of her heirs; but Mary Ann Craigen, the wife of John Craigen, and executrix under the will, had a life estate in said lands; that at the time their father married their mother, which was about the year 1836, he was entirely without means; that all the money and property acquired by him was the result of the profits accruing from the real estate devised to their mother and grandmother as aforesaid, and from the sale of a large part thereof, and charging and averring that the seven thousand dollars paid for the three hundred and ten and one-half acres of land conveyed to

said N. D. Parran by John Stump, and on which Parran resided at the time of his death, was the money and separate estate of their mother, Adaline, and their grandmother, Mary Ann Craigen, derived from the sale of her maiden lands and other property, and was paid for in the lifetime of said Mary Ann Craigen, and that the same was true as regards the other lands mentioned in plaintiffs' bill; that when the said Stump farm, of three hundred and ten and one-half acres, was purchased, the deed for same was made to N. D. Parran, instead of to the said Adaline Parran and Mary Ann Craigen, without the latter's knowledge and consent, and, when they learned how the deed had been drawn, they called the said N. D. Parran's attention to the fact, and asked that the said deed be corrected, or something done to show that said land belonged to them, and, at the death of her said husband, should become the property of respondents; that said N. D. Parran, recognizing the justice of said claim, at once assented to it, and drew up, or had drawn up, a proper paper writing, duly signed by him, wherein he acknowledged the real ownership of said land to be in their mother, and provided that, upon his death, the said John C. Parran and W. V. D. Parran (now Parsons) should be the owners of said land, and that this is equally true of the other lands mentioned in the bill; that, while the deeds were made to N. D. Parran, the money of respondent's mother and grandmother, derived from the sale of other lands and other property, was used in paying for them, and proper paper writings were signed by the said N. D. Parran as to these lands also, showing that upon his death they should be owned by respondents; that they had seen these paper writings, but were not then able to file them with their answer, as they had not yet been able to fully examine the papers left at his home by their father when he died, but would as soon as practicable make such examination and file such papers if they could be found, and, if they could not be found, they would ask leave of the court to prove their contents by oral testimony, which they could easily do to the satisfaction of the court; and averred that, by reason of the matters and things alleged in said answer, the said Parran only held said lands in trust for them during his life; and that at his death they became sole equitable owners

thereof, and that they still own the same; and praying that no further action should be taken by the court in this cause until the questions raised by the said answer should be inquired into and adjusted, and for general relief.

To which answer and cross bill plaintiffs R. L. Coleman, Emma P. Coleman, William S. Parran, and the defendants Nina A. Parran, widow of N. D. Parran, deceased, Martha Barbee and Samuel Barbee, filed their demurrer (which was overruled) and special replication, wherein they traverse every material allegation of the answer, denying that the seven thousand dollars, or any part thereof, paid for the three hundred and ten and one-half acres, the Stump land conveyed to N. D. Parran by deed of August 31, 1852, was the money and separate estate of Adaline, wife of N. D. Parran, derived from the sale of her maiden lands and other property, or that any part of said purchase money was paid out of the money or funds of Mary Ann Craigen, or that the other lands in the bill mentioned were purchased by the said N. D. Parran with the money and separate estate of the said Adaline Parran, derived from the sale of her maiden lands and other property, or that the Stump land and other lands mentioned in said bill, or any portion thereof, were purchased or paid for with the money of the said Mary Ann Craigen, or paid for in the lifetime of said Mary Ann Craigen; and averring that all the said lands, except the Stump land, were purchased by said N. D. Parran after the death of said Mary Ann Craigen, and that the purchase money for the Stump land, with the exception of the cash payment of three thousand dollars, was paid after the death of said Mary Ann Craigen; further, that the said real estate in the bill mentioned was purchased of said Stump by said N. D. Parran with his own money, and that the deed for said real estate was made to him, and that said real estate was held and owned by him in fee simple; and denying that said Adaline Parran and Mary Ann Craigen called the attention of said Parran to the fact that the deed was made to him, or that they asked that the deed should be corrected, or something done to show that said real estate belonged to them, and at the death of Adaline's said husband should become the property of said John C. Parran and W. V. D. Parsons; and denying that any such claim as is asserted in

the cross bill was made by Adaline Parran and Mary Ann Craigen, or either of them, or that such claim was recognized or assented to by said N. D. Parran; and denying that the said Parran drew up or had drawn up any proper paper writing, or any writing, duly signed by him, wherein he acknowledged the real ownership of said real estate to be in said Adaline Parran, and providing that, upon his death, the said John C. Parran and W. V. D. Parsons should be the owners of said lands; and denying that the other lands mentioned in the bill were purchased by Parran with the money of Adaline and Mary derived from the sale of her land and other property; and denying that proper paper writings were signed by said Parran as to these lands showing that at his death said lands should be owned by said Parran and Parsons, and that no such paper writing or writings ever existed; and utterly denying that any such writing or writings were ever seen by said John C. Parran and W. V. D. Parsons, or either of them; and denying that the said N. D. Parran only held said real estate in trust for the said John C. Parran and Parsons during his life, and that at his death they became the sole equitable owners thereof, and still own the same; and averring that all of said real estate in the bill mentioned was purchased by said Parran with his own money, and held by him in fee simple, and was not held by him in trust for Parran and Parsons, or for anybody else; and denying that said N. D. Parran, at the time he married Adaline Craigen, was utterly without means; and further denying that said N. D. Parran ever held said real estate, or any part of it, in trust, as alleged in the cross bill; but averring that, on the contrary, he purchased said real estate with his own funds, and the same was conveyed to him in fee simple, as shown by the deeds filed in the cause; further averring that said real estate was always held, owned, and claimed by N. D. Parran in fee simple; that he time and again offered to sell said real estate, and, in order to effect the sale of the same, placed it in the hands of other parties or agents, to sell at specified prices, for the sale of which said Parran was to pay the parties making the sale a commission; averring that on the 7th of September, 1887, he executed a deed of trust to Benjamin Dailey, trustee, conveying all his real estate in the bill mentioned, and, in ad-

dition thereto, a tract of about seven thousand acres, to secure a debt of three thousand dollars, a copy of which deed of trust is filed as an exhibit; that by deed dated the 14th day of December, 1889, N. D. Parran and wife conveyed to I. H. C. Pancake, for the sum of four thousand dollars, a tract known as the seven thousand acre tract, described in the deed as six thousand seven hundred and sixty-eight acres, and exhibited a copy of the deed; further averring that there was a suit pending in the circuit court of Hardy County concerning the said sale of land by Parran and wife to Pancake for several years, in which John C. Parran took a lively interest on behalf of the parties who instituted the suit against his father, but no claim or right whatever was set up or asserted by said John C. Parran and W. V. D. Parsons, although all the facts were then as much in their knowledge as now, and their father, N. D. Parran, was then living and vigorously defending said suit, and was sustained by the courts in his defense in said suit, and that said W. V. D. Parsons was fully aware of the sale of said lands to said Pancakes, and the pendency of said suit; and further averring that said Adaline Parran, the mother of said John C. Parran and W. V. D. Parsons, died on the — day of —, 1872; that on the 19th day of April, 1876, the said N. D. Parran conveyed to the said John C. Parran and W. V. D. Parsons all his right as tenant by curtesy in all the lands of their mother, the said Adaline Parran; that said deed was acknowledged on the — day of —, and was accepted by the parties and admitted to record on the 12th day of March, 1888, and on the 27th day of March, 1888, was examined and delivered to said John C. Parran, and averring that if, at the time of the execution of the last mentioned deed, John C. Parran and W. V. D. Parsons had any claim or right whatever to any lands held by said N. D. Parran that was the time to have asserted, or to have obtained some recognition of, their claims; but that their claim that they were the owners of said real estate mentioned in the bill, and that said lands were held in trust by the said N. D. Parran for them, was not made at that time, and was never made or heard of until several years after the death of N. D. Parran, and one year after the institution of this suit, and exhibited a

copy of said deeds of N. D. Parran to John C. Parran and W. V. D. Parsons; that said Parran and Parsons held what is known as the "Craigén Home Place" under said conveyance from the said N. D. Parran from the date of said deed up to the time of said Parran's death, and partitioned said place between themselves after said deed was made to them; further averring that the will of John Craigén set forth in said cross bill does not correctly present the title to the lands in said will set forth and devised, in this: that the said John Craigén did not have title to all of said home place and four tracts of woodland devised by said will to Adaline Craigén for life; that George See, by his will, a copy of which is filed with this answer, devised to John Craigén and Mary, his wife, one-half of the plantation upon which he resided, upon the conditions set forth in said will; that he gave to his daughter Phœbe Couchman the upper half of said place, to be equally divided between her and John Craighén, and, if she died without heirs of her body, the said half should be divided between John Craigén and Adam See; that the said Phœbe Couchman died without issue of her body, thus giving the upper half of the place to John Craigén and Adam See; that there is nothing in this cause to show that John Craigén and his wife purchased Adam See's interest in said place; and denying that said Craigén and his wife purchased said interest of said Adam See, which interest was one-fourth of said place; that, if said Craigén and his wife purchased Adam See's interest in said place under the provisions of George See's will, Mrs. Craigén would have been entitled to one-eighth of said place under said purchase, and to one-fourth under the will of George See, which would have made her interest in the place three-eighths.

Respondents, further answering, said that said N. D. Parran purchased said real estate in the bill mentioned for his own use and benefit, and denied that any arrangement, agreement, or understanding was made, before or after the purchase of any of the said real estate by him, either with the said Mary A. Craigén or his wife, that the said real estate, or any part of it, was purchased or held by him in trust for them, or either of them, or for the said John C. Parran and W. V. D. Parsons, or for any one

else; and, while denying that said N. D. Parran purchased said real estate from the proceeds of sale of the land or property of his wife, the said Adaline Parran, or with the money or property of Mary Ann Craigen, submitting that he had the right to receive the rents and profits of the land of his said wife, and to reduce her personal property into possession, and to make such use and investment thereof as he might desire or deem proper under the then-existing laws of the State of Virginia, and that even if the said N. D. Parran had received any money from Mary Ann Craigen, which is denied, that it would only have created a personal liability upon him, which could only have been enforced in a court of law, and which cannot at this time be continued into a trust; and claiming that the fact that said Stump land was purchased by the said Parran in 1852; that said Mary Ann Craigen died in 1853, leaving a will; that said Adaline Parran died in 1872 or 1873; and that N. D. Parran died in 1890; and that the said claim that the said Parran held the land in the bill mentioned in trust for the said John C. Parran and W. V. D. Parsons was never made or set up until the said cross bill was filed,—justifies the respondents in saying that the said claim of said trust is a stale claim, and is of such a character that a court of equity will not enforce it; and praying that the relief asked for in the original bill may be granted, and for general relief.

The will of George See provides for Mary Ann Craigen, his daughter, who was the mother of Adaline Louise Parran, as follows: "I give and bequeath unto my son-in-law, John Craigen, and his wife, Mary, and heirs, one-half of the plantation whereon I live, and adjoining Harness' land, and all the advantages arising therefrom to them and the heirs of my daughter Mary's body, forever. I give and bequeath unto my daughter Phoebe Couchman the upper half of my plantation, to be equally divided between her and John Craigen as to quality and quantity; but, should my said daughter die without heirs of her own body, it is then my will and desire that said half of my plantation should be divided between my son-in-law John Craigen and my son Adam See; and, should my son Adam dispose of the lands whereon he now lives, it is my desire that John Craigen and Mary, his wife, shall have

Adam's part, on paying to him, the said Adam, three hundred pounds in two annual payments; and also, on the death of my daughter, John Craigen and my son Adam shall pay to my son George See, Jr., one hundred pounds, to Cath. Paul one hundred pounds, to Leonard Stump and Eliza, his wife, one hundred pounds, and to John See's children one hundred pounds, to them and their heirs. *

* * I give and bequeath unto John Craigen and Mary, his wife, and to my daughter Phœbe Couchman, an out-survey upon Watt's Run, to be equally divided, and subject to the same rules as the property above divided, to them and their heirs, forever. I also give and bequeath unto my son George See, my son Adam See, my daughter Catty Paul, my daughter Phœbe Couchman, my son-in-law John Craigen and Mary, his wife, my son-in-law Leonard Stump and Eliza, his wife, and to the children of John See, dec'd, one share only of all my property remaining at my decease, and not here divided, to be divided equally amongst them and their heirs. Also, at the death of my beloved wife, it is my will that all the negroes left to her for life should be equally divided amongst my children, and the children of John See to have one child's share, as aforesaid, and to them all and their heirs, forever." The will of John Craigen provides for the immediate sale of his perishable property, not in said will otherwise disposed of, and proceeds applied to his debts; and to his wife, Mary Ann Craigen, he gave the plantation whereon he lived, with all household and kitchen furniture, two plows, one harrow, two work horses, four cows, twelve sheep, twelve hogs, with the gear belonging to the work horses, negroes Tom, Lean, Han, and Henry, for and during her natural life, out of which his children were to be supported until they should marry, provided they remained with their mother, and at marriage were to receive their proportionate share of the movables as an outfit agreeable to those who had been provided for already; and his wife to have full third part of all his lands during the same period, after her decease to be disposed of as in said will directed, all his other lands to be rented, except so much as his executrix might think necessary for the maintenance and support of those of his children who were then married and had families to maintain, or such as might thereafter place

themselves in such position as to require a home; then proceeds to devise to his several children by name, and the heirs of their respective bodies (and, in default of heirs of the body of any one at his death, the share of such to be divided equally among the others or their children), his various tracts of land; and to his youngest daughter, Adaline Louisa, he gave his home place, with four outsurveys in the mountains, "subject to the same limitations, to wit, for and during her natural life, and at her decease to the heirs of her body, and, in default of having any, to revert to the rest of my heirs." On the 2d of October, 1854, the will of Mary Ann Craigen was probated in Hardy County Court, wherein she bequeathed to her daughters Catherine E. Williams and Adaline L. Parran all the estate of which she might die possessed, saving and excepting certain sums of money, secured by deeds of trust executed by James Taylor to George W. Washington, trustee, for testator's benefit, which she bequeathed to a trustee for her daughter Eveline Taylor and her children.

Dr. N. D. Parran married Adaline Louisa Craigen about the year 1836, and resided on the Craigen place from that time until after the death of his wife, Adaline, which occurred about 1872. After his marriage to Miss Craigen, who was his second wife, he seems to have had a rather checkered career from a financial standpoint. He became involved, and in 1843, on his own application, he was declared a bankrupt by the United States district court of the Western district of Virginia, and on October 14th of that year was discharged from all his debts. After this, Dr. Parran continued to live at the Craigen place, and evidently took a very active interest in the affairs of the farm, and did considerable trading for himself, and, before his death, acquired some property at least in his own right, about which no question has been raised. At one time, in December, 1889, he sold a tract of some seven thousand acres of mountain land for four thousand dollars. James Wolf, a witness for appellants, testifies that he bought from him since the war a parcel of land for two hundred and twenty-five dollars; and M. H. Sec, one of appellants' witnesses, on cross-examination, to the question whether he was acquainted with Dr. Parran, and whether his "stand-

ing in the community as a business man, and honest and honorable man, was not of the very best," says: "I was very well acquainted with him, and his standing was of the very best,—among the best." On the 31st of August, 1852, Dr. Parran purchased three hundred and ten and one-half acres of land from John Stump, known in the record as the "Stump Farm." He paid three thousand dollars cash, and for the residue gave his several bonds for eight hundred dollars each, payable to John Stump, on the 1st days of September, 1853, 1854, 1855, 1856 and 1857, respectively. The deed for this tract of land was acknowledged and admitted to record in the clerk's office of Hardy County Court on the day of its date. There is evidence tending to prove that a part of the money, at least, paid on this farm, was from the Craigen farm, the proceeds of sale of two negroes and of a lot of cattle at different times; and there is conflict of testimony as to the part taken by Dr. Parran in the conduct and control both of the Craigen and Stump farms, some of the witnesses stating that Parran had no control, that Mary Ann Craigen did all the hiring and paying on the Craigen farm, and that John C. Parran built the house on the Stump farm, and managed the whole business, while others say that his father, N. D. Parran, did it, and file receipts for work done on the house, and prove that he hired and paid the expenses and controlled the matter. After the house was built, N. D. Parran moved onto the Stump farm, and worked it until his death. On the 7th day of September, 1887, N. D. Parran and wife, the defendant, Nina A. Parran, executed a deed of trust on said lands sought to be partitioned, including the Stump farm, and on a tract of six thousand seven hundred and sixty-eight acres of mountain land, to Benjamin Bailey, trustee, to secure to Ann E. Covell the sum of three thousand dollars. To show that the plaintiff in the cross bill, John C. Parran, regarded the land as being the property of his father, the defendants introduced two letters written by said John C. Parran, marked "Exhibit C," with deposition of M. W. Gamble, as follows: "Green Spring, W. Va., December 6th, 1889. Dear Pa: I am in receipt of a letter from Wm. Stump, here inclosed, informing me of the sale of your mountain land for the sum of \$5,126 dollars cash, you having given him authority—do so. You

after gave Messrs. Pancakes the option for \$4,000 on time. You must have forgotten your arrangement with Stump. Your chances for trouble are imminent. Possibly, by Ninie refusing to sign the deed may save you. In either case one party or the other will claim damage. I write hoping it may reach you before you have gone too far. The 40 acres in Shook's run is not included in your Green & Fleming tract. If you can keep it out, hold it for me. I had thought to have been up long since. Love to all. J." Also: "Green Spring, W. Va., Dec. 1889. Dr. Pa: I wrote hurriedly, and without knowing just how far you had gone. Have since had a talk with Will Stump, and I cannot see any way but to play out the best you can. It was not your intention formerly to sell all the timber from your Adam See land or your Stump farm, but I find you have made a clean sweep, even the 44 acres in Shook's run that you once sold to me in connection with 2 acres at Abe See's and Adam See's land for \$1,500; but, as you failed to make anything out of my part of home place, I give up the said land. I do not write this to embarrass you, but to remind you of the necessity of holding some timber—say, two or more hundred acres—you might reserve from your S. E. of Stump place corner, and running with the top of Stony Run ridge to Adam Harness' line, embracing the land east of Judy's and Neff's. Do not think me officious for offering these suggestions unrequested. I am prompted only by the best motives for your interest. I paid last spring \$754 security for parties. This was caused by a man who is now sucking the blood of some one else. That, with short crops last year, and this, has rendered me so thin one might read the declaration on both sides. Yet I am determined to pull through or die in the traces. I wish, if you see Mr. Adam Fisher, ask him if he would want any lime this spring, and, if so, what he will pay at kiln near John Redman's, or what delivered. I saw Will a few days ago. He regrets and condemns Pancake's action, knowing that the land was sold before he came to you, and the price. I am now getting out corn, badly damaged and light. Yours truly, J. C. Parran."

Appellants prove some declarations made by N. D. Parran, to the effect that he had no interest in the Stump farm. Witness George W. Cleaver says: "He told me

often that the Stump place belonged to Virginia and John Parran; and not only that, he told me a short time, a day or two, before Mrs. Parran's death, that he would have not a place to put his head under without it was John and Virginia's request to leave him a home, or stay there." Witness further stated that after the death of Mrs. Parran, when the doctor was talking about building on the Stump place, "he was not able to build himself, without John and Virginia helping him; that it would be coming to them any how after his death, and it was theirs at the time." Witness Mary Stump testified that, on the night of the death of Adaline L. Parran, she "went to console the doctor, and he told me that he hadn't anything on earth; he was homeless, and that everything belonged to Virginia and John." Witness Seymour Thorn says he heard a conversation between Dr. Parran and Mrs. Craigen and Mrs. Parran. The doctor said the Branson place was for sale, and they ought to try and buy it. "They said they would not do it; that he would have it deeded to himself as he did the Stump place." That witness heard N. D. Parran say "the land and house was theirs at his death, and he was to stay there while he lived. He wanted them to go to the expense of building the house for him to live in, as it was theirs at his death." There is no attempt to prove the sale of the life estate or estate by the curtesy of Dr. Parran in his wife's property, except by oral testimony, which is objected to. Witness Simon Dasher says: "I was present here in Moorefield when his life interest was sold in the Craigen place. As well as I recollect, it was sold or bid in at about \$2,100 by Jerrard Williams, if my memory serves me right." There is no evidence whatever that it was ever conveyed, or that N. D. Parran was ever dispossessed thereof. N. D. Parran had no interest by virtue of his marital rights in the "home place" of John Craigen at the time he filed his schedules in bankruptcy, and also at the time it is claimed his life interest was sold, as Adaline Louisa, his wife, took nothing therein until the death of her mother, Mary Ann Craigen, at which time she took a life estate in the estate of John Craigen, under his will, and the one undivided half in fee of whatever interest Mary Ann Craigen had therein, and which by her

will she left equally to Adaline and her sister Mrs. Williams.

The cause came on to be heard on the 18th day of March, 1896, upon the papers formerly read therein, the answer of John C. Parran and W. V. D. Parsons in the nature of a cross bill, and the amended cross bill of the said John C. Parran and W. V. D. Parsons, and upon the answer or special replication in writing to said cross bill and amended cross bill, and upon the second amended cross bill, making certain new parties to the suit, process duly executed thereon, and upon the depositions of witnesses with the objections thereon indorsed and sustained, by the objection of John C. Parran and W. V. D. Parsons; and, being argued by counsel, the court dismissed said answers of John C. Parran and W. V. D. Parsons so far as they are in the nature of cross bills setting up a claim by the said respondents to be the sole owners of the land in the bill and proceedings mentioned, at the cost of said respondents, the court being of the opinion that their said claim was not sustained, from which decree said Parran and Parsons appeal to this Court, and assign the following errors: "(1) The court erred in holding, as it must have been done, under the evidence in this cause, that Dr. Parran had any interest in the home place during the lifetime of Mary Ann Craigen, or his wife, Adaline L. Parran, or that he had curtesy in the home place of any of the outlying surveys after Adaline L.'s death. (2) The court erred in holding that the plaintiffs were entitled to any distributive shares of the lands acquired by Dr. Parran, as shown in this record. (3) The court erred in not holding that Dr. Parran's interest in all the real estate derived by his wife, Adaline, under the wills of John Craigen, Mary Ann Craigen, and Phœbe Couchman, ceased and determined at Adaline's death, and then reverted to petitioners. (4) The court erred in not holding that, as to the Stump place, Dr. Parran was simply a trustee for the petitioners; and, having been by them permitted to live on the farm till his death, all his interest therein ceased at his death. (5) The court erred in dismissing petitioners' cross bill."

It appears from the record that the original answer and cross bill of defendants John C. Parran and W. V. D. Parsons was, by leave of the court, amended by certain inter-

lineations made therein, as designated in the decree authorizing the amendments to be made, and the answer and cross bill as amended only appear in the record. The second amended cross bill simply prays that the certain parties named, the heirs of — Williams, deceased, be made parties to the suit, and makes no further allegations in addition to those contained in the amended cross bill. The allegations of the cross bill distinctly set up an express trust, alleging that N. D. Parran drew up, or had drawn up, a proper paper writing, duly signed by him, wherein he acknowledged the real ownership of said land (referring to the Stump place) to be in respondents' mother, and providing that upon his death the said respondents should be the owners of the land, and that this was equally true of the other lands sought to be partitioned, and that proper paper writings were signed by said N. D. Parran also as to such other lands, showing that upon his death they should be owned by respondents; that said respondents would file such papers, or, if they could not be found, they would ask leave of the court to prove their contents by oral testimony, which they could easily do, to the satisfaction of the court.

The respondents failed to produce or file such paper writings as they alleged were made and signed by N. D. Parran, acknowledging the real ownership of said lands, or any of them, to be in respondents, and made no attempt to prove by oral testimony the existence of such papers declaring an express trust, excepting by the testimony alone of respondents John C. Parran and W. V. D. Parsons, to the testimony of both of whom objection was made because of their incompetence as witnesses, under section 23, chapter 130, of the Code, and which objection was properly sustained. Respondents allege that the Stump farm was paid for in the lifetime of Mary Ann Craigen. The record does not show the exact date of the death of Mary Ann Craigen, but it was some time in 1853. Her will was admitted to probate October 2, 1854. Respondents rely largely upon the testimony of Seymour Thorn, who testifies that the cattle, the proceeds of the sale of which were for the last two payments on the Stump farm, were sold before the death of Mary Ann Craigen, while the fact is the last annual payment was due not until the fall of 1857; and the evi-

dence shows that N. D. Parran made large payments on said purchase money late in the 50's and one of three hundred and twenty-six dollars on the 27th of April, 1860. "A trust which results by implication and operation of law from the payment of the purchase money, or a part of it, and without any agreement, is a pure and simple trust of the ownership of the land. It is not an interest in the proceeds of the land nor a lien upon it for the advance, nor an equity or right to a sum of money to be raised out of it, or upon the security of it. Such rights arise from special agreements, and are the subjects of express trusts, or, when implied, it is from other circumstances than the mere ownership of the purchase money. There can be no resulting trust of an estate to a particular extent of its value in the grantee. * * * What is known as a resulting trust is a complete trust of original ownership, and it is nothing else. Therefore, to make a partial payment create a resulting trust at all, the money must be paid as a definite aliquot part of the consideration of the purchase, and thus the trust will be of an aliquot part of the whole estate in the property; but, unless the payment or advance be of a definite part of the consideration money as such, no trust will result by implication of law and without agreement." 2 Barb. Ch. Prac. § 288. This Court has gone further, and does not confine a resulting trust in a part, to an aliquot part, but makes it a trust *pro tanto*. "A resulting trust arising from the payment by a stranger of the whole or a part of the purchase money of land conveyed to another is a claim to the whole or a definite portion of the land, corresponding to the portion of the purchase money paid by such stranger, and not a lien upon the land for the sum of money paid by such stranger, as a part of the purchase money." *Shaffer v. Fetty*, 30 W. Va. 248 Syl., points 4 and 5 (4 S. E. 278). See, also, *Heiskell v. Trout*, 31 W. Va. 810 (8 S. E. 557); *Heiskell v. Powell*, 23 W. Va. 717. And where one pays part of the purchase price of land, and a deed is taken in another's name, so that a resulting trust arises, so it is certain what amount the one claiming under the trust paid (whether the part paid by an exact division of the whole or not—that is, whether it be an aliquot part or not—is immaterial), this will be a

trust *pro tanto*. There must be certainty as to the interest in the land." *Currence v. Ward*, 43 W. Va. 367, Syl., point 6 (27 S. E. 329), in which decision the question is thoroughly discussed by JUDGE BRANNON. "Where the trust does not appear on the face of the deed or other instrument of transfer, a resort to parol evidence is indispensable. It is settled by a complete unanimity of decision that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt. Where the payment of a part only is claimed, the evidence must show, in the same clear manner, the exact portion of the whole price which was paid." 2 Pom. Eq. Jur. § 1040; *Troll v. Carter*, 15 W. Va. 567, Syl., point 7; *Armstrong v. Bailey* (decided at this term) 28 S. E. 766. "A resulting trust is a mere creature of equity, as a resulting use is of law; and it cannot therefore arise where there is an express trust declared by the parties, and evidenced by a written declaration of such express trust." *Leggett v. Dubois*, 5 Paige 114. In *U. S. v. Union Pac. R. Co.*, 11 Blatchf. 402, (Fed. Cas. No. 16,598), it is held that, where a trust is express, "implications are thereby excluded."

The evidence adduced by the appellants, taken alone, and without considering much contradictory testimony taken by appellees, is vague and uncertain, and wholly insufficient to establish a resulting trust; and appellants having failed to sustain the allegations of their cross bill alleging the existence of paper writings declaring an express trust, either by producing such papers, or proving their contents, the decree complained of is affirmed, and the cause remanded to the circuit court, to be further proceeded in.

Affirmed.

CHARLESTON.

DARBY *et al.* v. GILLIGAN *et al.*43 755
45 488

Submitted June 8, 1897—Decided November 13, 1897.

1. REMAND FOR WANT OF PARTIES—*Bill in Equity.*

When a chancery cause is remanded from this Court to the circuit court for the want of necessary and proper parties, and after the cause is again docketed in the circuit court such necessary and proper parties appear, and file answers to the plaintiff's bill, it is not necessary to send the case to rules for that purpose. (p. 759.)

2. REFERENCE—*Accounting.*

The circuit court may state an account in a chancery cause without an order of reference to a commissioner, if there is sufficient data and evidence in the cause to enable it to properly do so. (p. 760.)

Appeal from Circuit Court, Taylor County.

Bill by Darby & Co. and others against John J. Gilligan and others. From the decree the First National Bank of Grafton and others appeal.

Modified.

W. R. D. DENT and JOHN T. MCGRAW, for appellants.

JOHN W. MASON, for appellees.

ENGLISH, PRESIDENT:

This was a suit in equity, brought in the Circuit Court of Taylor County by David Darby *et al.*, against John J. Gilligan *et al.*, to set aside a deed of trust executed by said Gilligan to John T. McGraw, trustee, to enjoin said trustee from disposing of the property mentioned in said trust, and to have the same properly applied. It appears from the records that the defendant Gilligan, on the 17th of September, 1883, formed a partnership with one James Burns for the purpose of carrying on the mercantile business in the house where said Gilligan was then merchandising; the said Gilligan putting in his stock of goods then on hand at two thousand dollars, and Burns paying into the concern in cash one thousand dollars, taking a one-third interest and Gilligan a two-thirds interest in the

concern. At the time the partnership was formed, said Gilligan was individually indebted to the First National Bank of Grafton and others in the sum of one thousand and one hundred dollars for money borrowed to use in his mercantile business before he formed said partnership. In carrying on the business the firm became indebted to the plaintiffs and others to insolvency, and on the 27th day of February, 1885, the partnership was dissolved, said Gilligan executing to said Burns his note for one thousand dollars, and Gilligan assuming all of the then existing indebtedness of the concern. On the 24th of April, 1885, said Gilligan executed to John T. McGraw a deed of trust conveying to him the entire assets of the late firm to secure the payment of all of his debts, including the debts due the plaintiffs and others by said firm, however giving preference in said conveyance to the one thousand and one hundred dollars due the Grafton Bank and others, the note executed to Burns by him for one thousand dollars, which note had been assigned by him to Anna Burns, and other individual debts, amounting in value to more than the property conveyed. John T. McGraw, trustee, filed his answer, in which he claimed that he had executed his duties under said trust deed, and had in his hands a fund realized out of the assets, and to be disbursed under said trust, in the sum of one thousand six hundred and fifty-four dollars and forty-three cents, and exhibited with his answer a statement of his receipts and disbursements, and on the 28th day of March, 1887, a decree was rendered in the cause holding that the question of fraud charged in the bill was not sustained, and, the plaintiff not asking an order of reference to settle the accounts of John T. McGraw, trustee, it was decreed that the injunction awarded in the cause be dissolved, and the bill dismissed, at the plaintiffs' costs, and from this decree the plaintiffs obtained an appeal to this Court, which was decided on the 6th day of June, 1880. A report of the case is found in 33 W. Va. 246 (10 S. E. 400), reversing the decree of the circuit court, and remanding the same; this Court holding that: "When one member of a mercantile firm purchases the interest of the other members, and in consideration thereof assumes to pay all the partnership debts, the firm and both members being at the

time insolvent, or on the eve of insolvency, and shortly thereafter the purchasing partner, without paying any of the firm's debts, conveys the whole of the assets of the late firm to a trustee in such manner as to devote the whole thereof to the payment of his individual debts, held, such sale, being without any valuable consideration, is ineffectual to convert the social assets into individual property, and as to the equitable rights of the firm creditors such trust deed was fraudulent and void."

After the cause was remanded to the circuit court, the same was referred to a commissioner, who was directed to report all of the social or co-partnership debts of said J. J. Gilligan & Co.; to whom due; the amount thereof, including interest; the priorities thereof, if any; also the co-partnership or social assets subject to the payment of said co-partnership debts. The First National Bank, John Flannagan, John T. McGraw, John S. Evans, and James Flannagan filed their joint answer to the plaintiff's bill, denying that the six hundred dollar note to the First National Bank of Grafton, payable to John Flannagan, and indorsed by the other respondents, and secured by the deed of trust executed by John J. Gilligan, was the individual debt of said Gilligan, and claimed that it was and is an accommodation note for the firm of John J. Gilligan & Co., for the purpose of enabling said firm to borrow funds from the respondent bank for the firm's benefit, and was so used by the said firm, and that respondents other than said bank were merely indorsers or sureties for said firm of John J. Gilligan & Co.; that in said trust deed said note was misrecited as bearing date on the — day of February, 1885, and payable six months after date, whereas in truth and fact it bears date the 29th day of January, 1885, and is payable four months after date, and was the only note of that description or amount held by the respondent bank. The commissioner to whom the account was referred returned his report on the 30th day of December, 1890, which was excepted to by the First National Bank of Grafton, John S. Evans, John T. McGraw, John Flannagan, and James Flannagan. They excepted to said report—First, because it failed to report said six hundred dollar bank debt as a partnership debt first in priority out of the social assets of John J. Gilligan & Co., as it was the only partnership debt

secured in priority in said trust deed, and said deed being held valid as to the partnership debts; secondly, because none of said debts are stated according to their proper legal priorities. John T. McGraw also excepted to said report—First, because it charged him with interest on the moneys in his hands, which moneys were held in his hands undischarged by reason of the injunction granted in the cause and subject at all times to the order of the court; secondly, because the commissioner failed to allow the taxes and attorneys' fees paid by him; third, because said commissioner failed to separate the individual accounts and funds of John J. Gilligan from the partnership assets; fourth, because said commissioner improperly states the priorities of the partnership debts to be paid out of the social assets in this case. On the 16th day of January, 1891, a decree was entered overruling said exceptions to said commissioner's report, confirming a second report made by said commissioner, and directing the disbursement of the money in the hands of John T. McGraw, trustee, in accordance with the finding of said second report, and from this decree an appeal was taken to this Court, and on the 26th day of November, 1892 (16 S. E. 507), it was held to be the practice in this State to treat trustees, special commissioners, and others empowered or directed to sell as special receivers of the proceeds of sale; that in such cases, except under special circumstances, such trustees and commissioners to sell are not chargeable with interest on the proceeds of sale; that a receiver, general or special, as the law now is in this State, has no authority to invest or loan out at interest any such funds in his hands unless ordered by the court so to do; that when such trustee, as in this case, is, by injunction, restrained from disbursing or paying out such fund until the future order of the court, and he answers that "he has the fund in hand, ready to disburse according to the trust deed, or as the court may direct," if the parties in interest desire it to be paid into the hands of the general receiver, they must so move; and the trustee who does not appear to have received interest or other profit on it will not be chargeable with the interest because he did not, of his own motion, cause it to be turned over to the general receiver, and that "a trustee defendant resisting the plaintiff's claim and failing in his defense, will not

be permitted to charge against the fund money expended in attorney's fees, unless it appears that such defense was reasonable and proper;" that "in such suits a court of equity has a wide discretion in awarding costs." But the case was reversed and remanded, in order that proper parties might be made, and that proper accounts might be taken. After the mandate was entered in the circuit court, on the 29th day of September, 1893, the cause was again heard, and upon consideration of the exceptions to said commissioner's report, taken by the First National Bank of Grafton, John S. Evans, John T. McGraw, John Flannagan, and James Flannagan, the court was of opinion that said exceptions numbered 1 and 2 were not well taken and should be overruled, which was accordingly done; and that of the exceptions taken by said John T. McGraw, trustee, those numbered one and four were well taken, and the court sustained them, and overruled exceptions 2 and 3, and sustained the two exceptions taken by the plaintiffs Wood, Bacon & Co., and confirmed the report in other respects, and the court proceeded to ascertain the several liens on the one thousand six hundred and fifty-four dollars and forty-three cents in the hands of J. T. McGraw, trustee, and made a statement of them according to their several priorities. The appellants, in their petition for an appeal in this case, say that, after said cause was remanded, said circuit court, without remanding said cause to rules, and without having brought before it the parties by the Supreme Court directed to be made parties to the suit, and without referring said cause to a commissioner to restate the accounts in the manner directed by the Supreme Court, proceeded to enter the final decree.

By referring to the record, it is perceived that Wheat and Naylor appeared, and filed their answer in the cause. Also that Peter Hanley, Ellen Hanley, Frank Hanley, and Michael Hanley, infant children of Patrick Hanley, deceased, having attained their majority, also filed their joint answer to the plaintiff's bill, disclaiming any interest in the funds in the hands of J. T. McGraw, trustee, so that all of the parties designated as necessary parties by the decree of this court appeared and answered, so that there was no necessity of remanding the case to rules.

It is further assigned as error that the court decreed the

six hundred dollar debt due the First National Bank of Grafton to be a partnership debt, to be paid by the executor of John T. Gilligan out of the unadministered assets in his hands, and by James P. Burns, the surviving partner. When we refer to the concluding paragraph of the opinion rendered by this Court on the 26th of November, 1892, we find that the cause was reversed and remanded with directions to see that all proper parties were before the court, and to have the proper accounts taken according to the principles laid down in *Darby v. Gilligan*, 33 W. Va. 246 (19 S. E. 400), and in *Baer v. Wilkinson*, 35 W. Va. 422 (14 S. E. 1). In the first-named case this court held that: "When one member of a mercantile firm purchases the interest of the other member, and in consideration thereof assumes to pay all the partnership debts, the firm and both members being at the time insolvent, or on the eve of insolvency, and shortly thereafter the purchasing partner, without paying any of the firm debts, conveys the whole of the assets of the late firm to a trustee in such manner as to devote the whole thereof to the payment of his individual debts, held, such sale, being without any valuable consideration, is ineffectual to convert the social assets into individual property, and as to the equitable rights of the firm creditors such trust deed is fraudulent and void;" and this syllabus was adopted and approved in the case of *Baer v. Wilkinson*, 35 W. Va. 422 (14 S. E. 1). Was it error on the part of the circuit court to proceed, as it did, to state the account in this case without a reference to a commissioner? A circuit court surely has the right to state an account when there is sufficient evidence and data in the record to enable it to do so, and it was held by this Court in the case of *Dorr v. Dering*, 36 W. Va. 466 (15 S. E. 93), that: "After a chancery cause has been heard, and a final decree pronounced in the court below, without an order of reference in any wise suggested or asked by the appellant, he cannot, for the first time, in the appellate court, assign such hearing without such order as error, unless it appears from the record that manifest injustice has been done him thereby, or that it was the duty of the court, of its own motion, if necessary, to send a cause to a commissioner before final hearing."

The second assignment of error relied on by the appel-

lants claims that "the court erred in not decreeing the \$600 debt due the First National Bank of Grafton to be a partnership debt to be paid by the executor of John J. Gilligan out of the unadministered assets in his hands, and by Jas. P. Burns, the surviving partner." As to this assignment of error the case occupies precisely the same attitude, so far as the testimony is concerned, as it did when the former opinion was rendered by this Court in the case. That opinion was handed down on the 26th of November, 1892 and HOLT JUDGE, in delivering the opinion of the Court, says: "Appellants' assignment No. 3. In not treating the \$600 bank debt as a firm debt, and because preferred in the deed of trust in not giving it priority out of the partnership funds. In the deed of trust Gilligan treats this \$600 debt as his private or individual debt. In his sworn answer to the bill he states it to be his individual debt; and in his first deposition he says it is his individual debt; and in his last deposition, although he says it was a firm debt, yet he admits he used part of it for private purposes. Plaintiffs' bill charged it as his individual debt. That was taken as true by the bank and all the other parties interested in the question, and the decision of the Court in *Darby v. Gilligan*, 10 S. E. 400 is based in part on the fact that it was Gilligan's individual debt, and so it will have to be regarded for the purposes of this case."

Appellants' assignments Nos. 3 and 4 are to the same effect as No. 2.

The fifth assignment claims that the court erred in giving Wood, Bacon & Co., priority over other partnership creditors on a fund already in the hands of the court for distribution. As to the question raised by this assignment, this Court, in its former opinion, above referred to, said: "Wood, Bacon & Co., in their answer filed, joined in plaintiff's attack upon the deed of trust as fraudulent, and therefore their claim should, as to the parties before the court, be ranked next in priority after the seven claims of the seven plaintiffs." It was discovered that all the necessary parties for a proper adjudication of the case were not before the court, and the case was remanded, in order that the proper parties might be convened, which was done after the case was docketed again in the circuit

court. No additional testimony was adduced. The answer filed by the Hanleys merely admitted that their claim was paid. The answer of Wheat and Naylor merely asserted the amount of their claim, and prayed for a decree in their behalf for the same, so that there is no cause for changing the opinion expressed in the former decree of this Court as to the character and priorities of the respective claims of the parties of the suit; and the circuit court, in stating the account in regard to the items contested, has conformed to the opinion indicated by the former decree of this Court as to the priorities of the claims asserted by the respective parties. For these reasons the decree complained of is affirmed, except so far as it fails to give the holders of said six hundred dollars a decree against the firm of Gilligan & Co., for the amount of said note and its interest, to be recovered from them out of any assets of theirs which were not being distributed in this suit, and to that extent the decree complained of is reversed, with costs to the appellants; and this Court, proceeding to render such decree as should have been rendered, it is decreed that John J. Gilligan and James Burns, partners doing business under the firm name of Gilligan & Co., pay to the First National Bank of Grafton the sum of eight hundred and thirteen dollars and thirty cents, with interest thereon from the 2d day of January, 1897, until paid, but this amount is not to be paid out of the trust fund in the hands of John T. McGraw, trustee.

Modified.

CHARLESTON.

HOFFMAN v. FLEMING *et ux.*

Submitted June 8, 1897—Decided Nov. 13, 1897.

1. EXECUTION—*Levy—Release of Surety.*

A levy under an execution upon property sufficient to pay the debt operates as payment, unless facts appear to deprive it of that legal effect, and *a fortiori* operates to release a surety of the principal debtor whose property was so levied. (p. 763.)

43	762
62	482

43	762
165	304

2. FRAUDULENT CONVEYANCE — *Actions—Equity Jurisdiction.*

The statute against fraudulent conveyances gives the absolute right to a creditor to a suit in equity to annul a fraudulent conveyance; and he is not compelled first to subject other property of the debtor, by execution or otherwise. (p. 764.)

Appeal from Circuit Court, Taylor County.

Suit by Benjamin F. Hoffman against James B. Fleming and others to set aside a deed. From a decree against them, James B. Fleming and his wife appealed.

Reversed.

JOHN W. MASON, for appellants.

BRANNON, JUDGE :

Hoffman obtained a judgment against J. M. Lake, James B. Fleming, and others, and sued out an execution, which was levied upon some personal property of J. M. Lake, the principal debtor. Fleming and his wife conveyed a tract of land to his brother-in-law, Marshall B. Lake, seven days after the execution of the note on which the judgment was based; and, three days later, Marshall B. Lake conveyed it to the wife of James B. Fleming. Afterwards a dwelling house was erected upon this land with means of the wife. Later, Hoffman brought this chancery suit, to set aside the conveyance from Fleming to Lake, and from Lake to Mrs. Fleming, alleging them to be fraudulent, because intended to defraud him of his debt, and claiming also that, as means of Fleming had erected the dwelling house upon the land, he could, on that score alone, subject the property to his debt. A decree was entered, finding that sufficient means of Fleming had been expended in the erection of the dwelling house to pay Hoffman's debt, and subjecting the land therefor; and Fleming and his wife appealed from that decree.

It is shown that personal property of the principal debtor was levied upon, of value sufficient to discharge the plaintiff's debt. It does not appear that it was sold, or what became of it; but the law says that a levy of an execution upon the debtor's property of value sufficient to pay the debt, is a satisfaction of it, unless circumstances

which in law, defeat such effect are made to appear. *McKenzie v. Wiley*, 27 W. Va. 658; *Campbell v. Wyant*, 26 W. Va. 702. Fleming was J. M. Lake's surety, and the fact that such levy was made on personalty operates, under the first-cited case and well-established principles of general law, as release of the surety. It is well settled that, after such levy, all right to any other suit is suspended as between the creditor and principal debtor, and certainly it would be as to the surety. *Freem. Ex'ns*, § 269. This suit was brought after that levy, and before any disposition of the property under it, so far as this record shows. This could not be done. But, in fact, it operates a discharge of the surety, in the absence of proof that it was taken by superior claim, or other reasons shown to deprive it of that legal effect. This decides the case. It is claimed for Fleming that, as some property was placed by the principal debtor in the hands of a co-surety as collateral security for the debt, the creditor must first look to it. If the conveyances are fraudulent, and as the husband built the house, I do not think that the creditor would be compelled to seek that property first. Parties in fraud have no equities against the rights of the defrauded creditor. The statute of fraudulent conveyances gives the absolute right to such creditor to assault the conveyance that removes his debtor's property from his pursuit. In its eye, all property of the debtor is amenable to the payment of his debts. The debtor can not fraudulently remove it out of the reach of the ordinary legal process. If he does, the statute grants the creditor the right to resort to equity to remove the vicious conveyance out of his way. Fraud is one of the recognized subjects of equity jurisdiction, and a very ancient foundation of its power. The fraudulent debtor or his fraudulent alienee cannot tell the creditor to look to other property, and excuse that which has been wrongfully conveyed. They have no rights which equity is bound to respect. *Horn v. Foundry Co.*, 23 W. Va. 522, and opinion; *Railroad Co. v. Soutter*, 13 Wall. 517; *Stout v. Mercantile Co.*, 41 W. Va. 339 (23 S. E. 571); *Almond v. Wilson*, 75 Va. 613, 627; *Wait, Fraud. Conv.* §§ 60, 192, and close of section 369. I am satisfied that the circuit court was correct in holding that the expenditure of the means of Fleming in the erection of the

house would justify the decree but for the fact that the levy upon the personal property operates as payment and release of the surety. On that ground, I conclude that the decree is wrong, and must be reversed, and the bill dismissed. I do not pass on the question of fraud in the conveyances. It is unnecessary to do so.

Reversed.

CHARLESTON.

MCNEILL *et al.* v. MCNEILL *et al.*

Submitted September 3, 1897—Decided November 13, 1897.

1. **DEED**—*Death of Vendor—Revocation.*

A deed duly executed and delivered, which conveys the legal title to real estate to a vendee, although a mere power to sell, is not revoked by the death of the vendor. (p. 768.)

2. **EQUITY JURISDICTION**—*Payments—Reversion.*

A court of equity will not prematurely determine to whom a sum payable in the future, the payment of which is optional with the payor, will be coming, or, in default of the payment thereof, to whom the title to real estate forfeited thereby will revert at a remote future time. (p. 769.)

Appeal from Circuit Court, Hardy County.

Bill by George D. McNeill and others against E. W. McNeill and others. Decree for defendants. Plaintiffs appeal.

Affirmed.

J. N. MULLAN and H. B. GILKESON, for appellants.

H. S. CARR and BENJ. DAILEY, for appellees.

DENT, JUDGE:

George D. McNeill *et al.* appeal from a decree of the Circuit Court of Hardy County, entered in a cause therein pending, wherein they were plaintiffs, and E. W. McNeill and others were defendants. The grounds of error assigned are as follows: (1) That the court refused to cancel, as null and void, a certain deed executed by B. S. McNeill,

deceased, to E. W. McNeill, on the 10th day of July, 1889, for the reason that the same was a mere power of attorney. (2) In not decreeing who was entitled to the purchase money secured in such deed, provided the same should be paid within the time limited; and, if not, to whom the land would revert. The deed is as follows:

"This deed, made this 10th day of July, 1889, between B. S. McNeill and Margaret McNeill, his wife, parties of the first part, and E. W. McNeill, party of the second part, all of the county of Hardy and State of West Virginia, witnesseth, that the said parties of the first part, for and in consideration of the sum of fifteen dollars per acre, to wit, \$14,250, to be paid unto the said parties of the first part, their heirs or assigns, or personal representatives, within ten years from this date, by the said party of the second part, or his assigns, the said parties of the first part hereby grant, sell, and convey unto the said party of the second part, and his assigns, with general warranty, the one undivided half of the following tract or parcel of land, lying and being in the county of Tucker, in the State of West Virginia, described as follows, to wit: One undivided half of a tract or parcel of land containing nineteen hundred acres, more or less, lying on the Dry Fork of Cheat river, in said county and state; it being the same tract of land surveyed for Francis and William Deakins on the 24th day of October, 1792, and conveyed to them by the commonwealth of Virginia by patent bearing date on the 10th day of June, 1794, and the same tract conveyed by Francis W. Deakins and wife, deed dated September 16th, 1839, and W. F. Deakins and wife, by deed dated August 15th, 1839, by John Hoy and wife, by deed bearing date the 5th day of October, 1839, and by Tobitha M. Cassin, John Heath, George MacLeod and wife, Richard Surpell and wife, and others, by deed dated the 30th day of June, 1837, to Daniel R. McNeill, William C. McNeill, and said B. S. McNeill, party of the first part, all of which aforesaid deeds are of record in Randolph County, in the State of West Virginia; the said county of Tucker at the time of the execution of said deeds being a portion of Randolph county. It is further provided and expressly agreed by the parties to this deed that unless the said E. W. McNeill, party of the second part, or his

assigns, shall, within ten years from the date of this deed, pay to the said party of the first part, his personal representatives or heirs, the sum of fifteen dollars per acre, to wit, the sum of \$14,250, then and in that event the lands hereby conveyed shall revert to and vest in the said parties of the first part, or their heirs, and this deed shall be null and void, and the said parties of the first part, their heirs or personal representatives, shall have no right of action under this deed against the said party of the second part, or his assigns. Witness our hands and seals. B. S. McNeill. [Seal.] Margaret McNeill. [Seal.]

“State of West Virginia, Hardy County, to wit: I, H. G. Maslin, a justice for the county aforesaid, do certify that B. S. McNeill, whose name is signed to the above writing bearing date the 10th day of July, 1889, has this day acknowledged the same before me in my said county. Given under my hand this 10th day of July, 1889. H. G. Maslin, Justice.

“State of West Virginia, Hardy County, to wit: I, H. G. Maslin, a justice for the county aforesaid, do certify that Margaret McNeill, the wife of B. S. McNeill, whose names are signed to the above writing, bearing date the 10th day of July, 1889, personally appeared before me in the county aforesaid, and being examined by me privily and apart from her husband, and having the said writing fully explained to her, she, the said Margaret McNeill, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it. Given under my hand this 10th day of July, 1889. H. G. Maslin, Justice.

“State of West Virginia, Hardy County, to wit: Be it remembered that on the 10th day of May, 1890, this deed, with the certificates thereon indorsed, was filed in the clerk's office of the county court of Hardy county, and admitted to record. Teste: Robt. A. Wilson, Clerk County Ct. H. C.”

The effort of plaintiffs, opposed by defendants, was to show, by a prior written contract, and by parol evidence, that this deed was a mere power of attorney to sell, and not an absolute sale, and that by reason thereof it was revoked by operation of law on the death of B. S. McNeill, the grantor. The defendant insisted that it was an abso-

lute sale, optional in ten years, on condition of the payment of the purchase money within the time limited. Unfortunately for the plaintiffs, viewing the deed, from their standpoint, as a mere power to sell, yet it was coupled with such interest as rendered it irrevocable on the death of the grantor; for the legal title was fully vested in the grantee, and in making a sale he acted for himself, and not as agent or attorney for the grantor, to wit, in his own name. The law on this point is laid down by Chief Justice Marshall in the case of *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 204, where he says: "The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name; must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle." Also: "We know that a power to A., to sell for the benefit of B., ingrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing, which enables him to execute it in his own name, and is therefore not dependent on the life of the person who created it." The instrument under consideration, by its terms, shows that this was the plain intention of the grantor, as he provides for payment of the purchase money in case of his death. So, viewing the controversy in the strongest possible light for

plaintiffs, the circuit court committed no error against them. Nor was it wrong for the court to refuse to determine to whom the purchase money should be paid, if paid in time, and, if not, to whom the title should revert. Not all the heirs of B. S. McNeill who would be interested in such determination are before the court, and hence they would not be bound thereby. Not only this, but the question is premature, for death may make quite a change in the parties before the time limit has expired. It is true, if the vendee defendant was ready to pay the purchase money, for his own protection he might ask the court to construe the will and deed, and determine to whom he should pay, or relieve him by assuming charge of the fund, but he is not so asking. The decree is affirmed.

Affirmed.

CHARLESTON.

SISLER v. SHAFFER.

Submitted June 9, 1897—Decided November 13, 1897.

1. EVIDENCE—*Party to Suit—Relevancy.*

A party to a suit who testifies in his own behalf to a fact irrelevant to the issue in support of his own testimony, and prejudicial to his opponent, cannot object to its contradiction on the ground of irrelevancy. (p. 771.)

2. NEWLY-DISCOVERED EVIDENCE—*Review on Appeal.*

Whether either party may introduce newly-discovered testimony after a case has been once closed is a matter of sound discretion, which will not be reviewed, unless it has been clearly abused. (p. 771.)

3. NEWLY-DISCOVERED EVIDENCE—*Setting Aside Verdict.*

Newly-discovered evidence, merely cumulative, however apparently decisive, is not sufficient cause to justify setting aside the verdict of a jury. (p. 771.)

4. APPEAL—*Review on Appeal.*

This Court will not disturb the verdict of a jury, founded on conflicting testimony approved by the trial court, unless the evidence, as a whole, clearly and plainly preponderates against such verdict. (p. 772.)

43	769
44	220

43	769
46	241

43	769
48	71
48	338

43	769
55	401

43	769
58	181

43	769
65	262

Error to Circuit Court, Preston County.

Action by John F. Sisler against Gus J. Shaffer. Plaintiff had judgment. Defendant brings error.

Affirmed.

NEIL J. FORTNEY and HENRY CLAY HYDE, for plaintiff in error.

P. J. CROGAN, for defendant in error.

DENT, JUDGE :

Writ of error from a judgment of the Circuit Court of Preston county in favor of Joseph F. Sisler against Gus J. Shaffer, for the sum of two hundred and eighty-nine dollars and fifty-two cents, with interest and costs. Defendant assigns the following errors, to wit: (1) That the witnesses Michael Lynch and James Wright were permitted to testify as to separate purchases of them at other times and places not involved in the present suit; (2) that the defendant was not permitted to introduce newly-discovered evidence after the argument of counsel, but before the retirement of the jury; (3) that the verdict of the jury was not set aside on account of newly-discovered evidence, and because contrary to the law and the evidence.

The question of fact involved in this suit was as to whether the defendant, when he purchased a certain lot of lumber of the plaintiff, made known that, in making the purchase, he was acting as the agent of Bew & Co. Plaintiff testified that he did not do so. Defendant, on the other hand, testified to the contrary; and in support of his defense, while giving his testimony in chief, made the broad statement that at the time of the purchase in controversy he was not engaged in buying or shipping any lumber on his own account. To discredit the defendant's testimony, the court allowed the plaintiff, over the objection of the defendant, to introduce the witnesses Lynch and Wright, who testified that about the same time the defendant had purchased separate bills of lumber of them, and that they had or were about to sue him therefor. This was not a matter material to the issue, about which the defendant ordinarily could be contradicted. His own evidence on the point was irrelevant, but, having introduced it in support

of his evidence, the plaintiff had the right to contradict it. "A party who draws from his own witness irrelevant testimony, which is prejudicial to the opposing party, ought not to be heard to object to its contradiction on the ground of its irrelevancy." 29 Am. & Eng. Enc. Law, 793, 794; *State v. Sergeant*, 32 Me. 429. Strange cattle having wandered through a gap made by himself, he cannot complain. It was a question of sound discretion with the court as to whether the newly-discovered evidence should be permitted to go to the jury at the late stage at which it was offered; and this discretion was not abused, as the court could not permit it to be heard at that time without re-opening the case, and it was improper to do so, unless the evidence was sufficient to justify setting aside the verdict, if one had been found before its discovery. To admit would have been equivalent to granting a new trial, as the plaintiff would have the right to have the case continued on the grounds of surprise. Hence this at once raises the question as to whether the newly-discovered evidence would justify the setting aside of the verdict. The defendant testified that at the time the purchase was made of the plaintiff he informed him that he was acting as the agent of Bew & Co. Stemple's evidence, newly discovered, would have fully corroborated defendant, and wholly related to that to which he had testified, and in all probability would have been sufficient to have defeated the plaintiff's action. Unfortunately, it comes strictly under the character of evidence called accumulative, and which, as has long been the settled law, is insufficient to sustain a motion for a new trial. *Grogan v. Railway Co.*, 39 W. Va. 421 (19 S. E. 563); *Halstead v. Horton*, 38 W. Va. 727 (18 S. E. 953); *Carder v. Bank*, 34 W. Va. 38 (11 S. E. 716); 16 Am. & Eng. Enc. Law, 575. This rule has been denounced as not being founded on just or solid grounds. *Silver Plate Co. v. Barclay*, 48 Hun, 56. But it has been too long established now to be disregarded. It is said in support of the rule, that, were it otherwise, "not one verdict in ten would stand. Some corroborating evidence may always be found or made, and the trial by jury would be the most precarious of all trials." "Every one must perceive the inconvenience and delay which will arise from granting new trials upon the discovery of new testimony or other wit-

nesses to the same fact. It often happens that neither party knows all the persons who may be acquainted with some of the circumstances relating to the point in controversy. If a suggestion then of the present kind be listened to, a second, if not a third and fourth, trial may always be had. There may be many persons yet unknown to the defendants who may be material witnesses in this cause, and this may continue to be the case after a dozen trials." Hil. New Trials, p. 500, § 13. It looks like a great hardship that a defeated litigant should not be permitted to have the advantage of after-discovered and strongly decisive corroborating testimony which he was unable to use at the trial; yet to establish such a precedent would be to cause litigants to be careless in preparation for trial, and open the way to the manufactory of such testimony, to the delay and subversion of justice.

The last point relied on is that the verdict is contrary to the law and the evidence. The facts undisputed are that the defendant contracted to purchase a certain lot of oak lumber of plaintiff, who loaded and shipped the same to Bew & Co., of Baltimore. Some time after shipment Bew & Co. went out of business, without paying for the lumber. The question of dispute is as to whether the defendant informed plaintiff that he was making the purchase as the agent of Bew & Co. in such manner as to relieve him from liability. Defendant maintains he did. Plaintiff denies it. The evidence of the witnesses Lynch and Wright is discredited by the fact that they are setting up the same kind of claims against the defendant, and are interested in requiring the defendant to make good the losses sustained by the failure of Bew & Co. The legitimate evidence, as certified, is contradictory and apparently preponderates in favor of the defendant. Yet the jury found against him, and the circuit court which heard the testimony, confirmed the finding, and this Court will not disturb it, unless it can hold that it is "plainly against the decided and clear preponderance of evidence." *Johnson v. Burns*, 39 W. Va. 658 (20 S. E. 686); *Akers v. De Witt*, 41 W. Va. 229 (23 S. E. 669). In all similar cases of agency, the true inquiry is, to whom was the credit given—to the agent or principal, or both? The agent can always relieve himself from responsibility by distinctly and

unequivocally making the contract in the principal's name, and not in any wise lending his credit thereto. Or he may buy for the principal, and still make himself liable by dealing in such way as to lead the seller to believe that, although he is buying for a disclosed principal, he (the agent) is to be the responsible paymaster. *Mechem*, Ag. § 564; *Story*, Ag. §§ 266, 267. If the agent would escape personal responsibility, "it is his primary function to bind the principal, and not himself; and likewise to bind such third persons to the principal and not to himself." *Mechem*, Ag. § 408. "The act of the agent should purport to be what it is intended to be,—the act of the principal,—and should be performed in his name by the agent as such." *Id.*, § 417. In the case of *Cobb v. Knapp*, 71 N. Y. 348, an almost similar case to the one under discussion, except that wheat instead of lumber was involved, the judge says: "In this case the evidence of the defendant, which was to some extent corroborated, if true established a case of non-liability." "If the jury adopted the plaintiff's evidence, it made a clear case of liability." "If the verdict was wrong, it was the error of the jury," which this Court is powerless to disturb and the judgment must be affirmed.

Affirmed.

CHARLESTON.

STATE v. HANSFORD.

Submitted June 9, 1897—Decided Nov. 13, 1897.

1. CONTEMPT—Power to Punish—Summary Punishment.

The common-law power of all courts, except the Supreme Court of Appeals, to punish for contempt summarily,—that is, without indictment and jury,—is curtailed by section 27, chapter 147, Code 1891. Summary punishment, as at common-law, can be imposed by such other courts only in cases therein allowed. (p. 774.)

2. PARTIES—New Trial—Petition—Strangers.

There is no right in citizens and taxpayers not parties to a suit to petition for a new trial or other action therein. There is no right to petition a court "for redress of grievances" by

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strangers to the case. That right is applicable only to political bodies. (p. 776.)

3. ATTORNEY AT LAW.

An attorney at law is an officer of the court, under clause 3, s. 27, c. 147, Code 1891. (p. 774.)

4. CONTEMPT—*Petition—New Trial.*

The mere drafting by an attorney of a petition, by persons not parties to a cause, asking in respectful language a new trial, is not a contempt. (p. 775.)

5. CONTEMPT—*Official Act.*

To punish an officer of a court for misbehavior under clause 3, s. 27, c. 147, Code 1891, the act must be done in his official character. (p. 777.)

6. CONTEMPT—*Rule—Procedure for Contempt.*

If a person be present in court when fined for contempt, a rule need not be served upon him, but he must be allowed to make defense, except for acts done in the open presence of the court. (p. 777.)

Error to Circuit Court, Tucker County.

L. Hansford was fined for contempt, and brings error.

Reversed.

L. HANSFORD, in pro. per.

EDGAR P. RUCKER, ATTORNEY GENERAL, for the State.

BRANNON, JUDGE:

L. Hansford was fined by the Circuit Court of Tucker County for a contempt, and comes to this Court for reversal of the judgment. No brief or view or single citation of authority aids us in the decision of the case. I have given a careful examination to it, and am of opinion that the judgment is erroneous. The common law gives to courts the power to punish for contempts summarily; but this wide power has been curtailed in this State by section 27, chapter 147, Code 1891, providing that courts and judges may punish for contempts summarily only in the cases there specified. I do not think that this case falls under any of the provisions of that statute, unless it be under its third clause: "Misbehavior of an officer of the court in his official character." Hansford was an attorney of that court. An attorney, though not a public officer of state, is an officer of the court. *Ex parte Faulk-*

ner, 1 W. Va. 269; *Ex parte Quarrier*, 2 W. Va. 569; *Ex parte Garland*, 4 Wall. 378; Weeks, Attys. c. 2. But though Hansford was an officer of the court, within the meaning of that Code provision, yet two questions present themselves to the mind. One is whether the act charged as a contempt is in law a contempt; and the second is, even if it be such, whether it can be said that it was done in his official character as an attorney; for, to be punishable, it must be such. The wrong imputed to Hansford is that a case was tried in said circuit court of the county court against Degler, in which a jury found a verdict against Degler; and with it there was some popular dissatisfaction, and certain citizens of Tucker County proposed a demonstration in his behalf, which Hansford, who was counsel for Degler, repressed. Then he was requested to draw a petition to the judge for a new trial. He objected to doing so, but was so importuned and charged with disloyalty to his client that he yielded, and drew the petition, and delivered it to Degler's father, and it found its way into the judge's hands. Hansford did not solicit signatures, nor did he present it to the court, and, after its drafting, heard of it for the first time in court. For his action in this matter he was fined. I have not been able to see in this, which is a punitive proceeding, where we ought to be clear, that the act is contempt. This petition is respectful in language, simply expressing the opinion of its signers that great injustice had been done Degler in the verdict of the jury, and asking a new trial. Did the preparation of such a petition constitute a punishable contempt? What is a contempt? Cooley's Bl. Comm. Bk. 4, p. 283, says that contempts "are either direct, which openly insult or resist powers of the court or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority." Thus contempts are of two kinds,—direct and constructive. A direct contempt is one offered in the presence of the court, while sitting judicially. A constructive contempt is one which tends to obstruct and embarrass a court, though the act be not done in its presence. *State v. Gibson*, 33 W. Va. 97 (10 S. E. 58); *State v. Frew*, 24 W. Va. 469; *People v. Wilson*, 64 Ill. 195. In

Ex parte Robinson, 19 Wall. 505, "contempt" is defined as an act in disrespect of the court or its process, or which obstructs the administration of justice, or tends to bring the court into disrepute. In *People v. Wilson*, *supra*, it is said that all acts which "impede, embarrass, or obstruct a court, or tend to produce such effects, whether done in or out of court, are to be considered as done in the presence of the court, and are contempts." I do not think that the act of drawing the petition can be made a contempt, under the above definition. It did not insult or revile the judge, or derogate from his respect or authority, or resist his processes or orders, or impede or embarrass the administration of justice. I have not found, in quite an extended examination, any definition of contempt which would brand this act as such, unless it be the principle stated in *State v. Doty*, 90 Am. Dec. 671, that "power of judicature implies the right to exercise that function undisturbed by improper influences affecting it extraneously; and an act done within the presence of the court by a person neither a party to a suit nor an officer to the court may amount to contempt." Now, no one but a party has a right to file a petition for a new trial, or for any other action in a court. A stranger has no rights therein. He has no right to exert any outside influences upon the judge, because that judge must decide upon the facts and law uninfluenced, untrammelled, uncompelled by popular clamor or any extraneous influences. A petition by strangers may justly be said to be improper intermeddling, having no other purpose or result than to unduly influence the court in its action; and, with all respect to the worthy attorney involved in this case, I must declare such action reprehensible. It is important, as a matter of practice, to thus condemn it; but, then, it does not seem to amount to a punishable contempt. The judge had but to reject the petition. It could not impede or obstruct the administration of justice, though I can not say that it might not tend to divert its course. It verges very closely upon the borderland of punishable contempt, though I hardly think it crosses it. It must be remembered that, while the right to petition public authority for redress of grievances is a sacred right, yet it is inapplicable to courts when acting judicially in cases before them. It applies to congress or to the legislature and

to the governor; but it can not apply to courts, for the reason that courts must decide solely upon the facts and law of the case. Strangers to it have no grievances to redress. I therefore repeat that I do not regard the act as a criminal contempt.

But, again, if this act were a contempt in its nature, would it be one done by this officer in his official character? For I repeat that it must be an act done in "his official character" to be punishable under that statute summarily. An act may be a contempt subject to indictment; but, to be punishable summarily,—that is, without jury,—it must fall under that section of the Code. *Com. v. Deskins*, 4 Leigh, 685; *State v. Frew*, 24 W. Va. 416, 469. Now, if this act were a contempt, and if Hansford had presented the petition in court, it would be an act done in his official character as attorney; but the mere drafting of it out of court does not constitute it an official act. The test of an official act is, was it done *colore officii*,—by color of office? This act was not such. It will be said, if this be so, then an attorney, owing respect and duty to a court, may in his office draft the most contemptuous petition with impunity, knowing that it will be presented to the court. This is not so. He would be indictable just as anybody else would be, but it would not be an act by color of office. Hence, for want of that character, the act is not contempt. Though the statute punishes mere misbehavior, yet, I think, it must be such an act as constitutes contempt.

It is assigned for error that no rule issued against defendant. The record distinctly shows that defendant was in court when fined. In *State v. Frew*, 24 W. Va. 469, it is laid down that the usual course is to award a rule to show cause why an attachment should not issue, and its omission would be error; but when the defendant is present, as the opinions in that case, and *Dandridge's Case*, 2 Va. Cas. 408, and *State v. Miller*, 23 W. Va. 801, show, that dispenses with a rule. In addition, I see that section 29, chapter 147, dispenses with it if defendant is present. And, further, the record shows that the defendant was called into court to show cause why he should not be fined. So this informal rule is present in the record.

Defendant asked leave to file a written answer to the accusation made against him by witnesses giving information

to the court, but was refused. Still, he did orally present his defense against the rule, and it was considered. Of course, it would be error to refuse such answer if such oral defense had not been allowed, as the very object of a rule is to cite the defendant to make defense, and he has a right to make it except where the act of contempt is in open court, in its presence. *State v. Gibson*, 33 W. Va. 97, (10 S. E. 58). This was not an act in open court. I do not see that the refusal of a written answer under these circumstances would be error. No written answer offered is in the record to show that additional defense was tendered, nor does it appear that any exists. The defense made, that Hansford had suppressed a popular demonstration, and protested against drafting the petition, and did so only on repeated importunities, is no valid defense, as he showed himself that he recognized the act as wrong or imprudent. I think the attorney intended no willful contempt; but in *State v. Green*, 16 W. Va. 864, syl. pt. 3, it is held that, where a contempt is merely inadvertent or reckless, a fine may be imposed. But I do not regard the act a contempt, as stated above. Judgment reversed, and proceeding dismissed.

Reversed.

CHARLESTON.

ARMSTRONG v. BAILEY *et al.*

(BRANNON, JUDGE, *dissenting.*)

Submitted June 9, 1897—Decided November 17, 1897.

1. FRAUD—*Burden of Proof.*

A plaintiff who alleges fraud must clearly and distinctly prove the fraud alleged in the bill. The *onus probandi* is on him, and, if the fraud is not strictly and clearly proved as it is alleged, relief cannot be granted. (p. 784.)

2. TRUSTS—*Parol Evidence.*

Parol evidence to establish a trust must be clear and unquestionable to produce such result. (p. 784.)

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Appeal from Circuit Court of Taylor County.

Bill by Adolphus Armstrong against Thornsburly Bailey and others. From a decree for defendants, plaintiff appeals.

Affirmed.

A. ARMSTRONG, in pro. per.

W. R. D. DENT, for appellees.

McWHORTER, JUDGE :

On the 4th day of February, 1869, Burton Despard and wife conveyed by deed, to John W. Bailey, George Bailey, and E. S. Shackelford, a tract of one hundred and fifty-seven and one-half acres of land in Taylor County, in consideration of the sum of two thousand three hundred and sixty-two dollars, to be paid thereafter as provided in said deed, the payments being evidenced by the several bonds of the purchasers, bearing date January 11, 1869, and the vendor's lien retained in said deed to secure the said purchase money. The purchasers, together with Thornsburly Bailey, the father of John and George Bailey, and father-in-law of said Shackelford, took possession of the land, built a house and made other improvements on it. The father with his family, including said John and George, who were then unmarried, and a younger brother, Harvey A. Bailey, occupied the premises as a home. After some time, John and George married, each building a house on the said land, and accupying the same, while the father and mother, with Harvey and a younger sister, continued to occupy the first house built. On the 6th of March, 1883, the purchasers, John W. Bailey, George Bailey, and E. S. Shackelford, and their wives, sold and conveyed, by deed of that date, to Harvey A. Bailey, the younger brother, fifty and one-half acres, a part of said tract of land, in consideration of seven hundred and sixty-six dollars and sixty-seven cents, retaining in said deed their vendor's lien for said purchase money, and also providing in said deed the following clause: "But, to secure said land, a dowry is hereby retained for Thornsburly Bailey and Catherine Bailey, his wife, during their natural lives." This deed was duly executed but not recorded until the 8th day of February, 1892.

On the 25th day of February, 1892, Adolphus Armstrong, a judgment creditor of Thornsby Bailey, sued out of the clerk's office of the circuit court of Taylor county a subpoena in chancery against Thornsby Bailey, John W. Bailey and Syrene Bailey, his wife, George Bailey and Basheba Bailey his wife, Ephriam S. Shackelford and Henrietta Shackelford, his wife, and Harvey A. Bailey, returnable to March rules, 1892. And at March rules, all the defendants having been served, said Armstrong filed his bill, alleging that in consideration of \$—— paid in equal amounts by Thornsby Bailey, the father, and his two sons John W. and George Bailey, on the 4th day of February, 1869, Burton Despard sold to them jointly the said one hundred and fifty-seven and one-half acres of land, and that although Thornsby paid one full third of said purchase money to said Despard, through said Shackelford, caused or procured said Despard to make said deed to Ephraim S. Shackelford, son-in-law of said Thornsby, and his two sons John and George Bailey, "in order to conceal and deceive and consummate the fraud" in said bill charged; that said Thornsby Bailey owned one full third of the one hundred and fifty-seven and one-half acres of land purchased by him and his two sons John W. and George Bailey, paid one-third of the price, and has from the date of said purchase at all times owned and now owns —— acres of said land; that, after they so purchased the land by arrangement and understanding between him and his said two sons, a portion of the land was set apart for said Thornsby, as between him and his two sons; that he built a house and made other improvements thereon, and has continued to reside in said house, and still resides therein, and that said fifty and one-half acres belongs to Thornsby, though the legal title is in his son Harvey A. Bailey; that Thornsby procured the deed of the 6th of March, 1883, to be made by John W. and George Bailey and E. S. Shackelford and their wives for the full share of interest belonging to said Thornsby to said Harvey A. Bailey, who was a young man, unmarried, at date of deed, residing with his father on the land, and was under 21 years of age; that said Shackelford never paid anything for said land, except what he paid for Thornsby, who provided the money so paid to Despard;

that said Harvey A. Bailey paid no part of the price of said land; that it is not his land, but the land of Thorns-bury Bailey; that what the grantors call a "dowry" is retained in said deed for the benefit of said Thorns-bury and Catherine, his wife, during their natural lives, meaning thereby to reserve an estate for life in said land for said Thorns-bury and Catherine, and charging that Thorns-bury, through Shackelford, bought and paid for one full third of the one hundred and fifty-seven and one-half acres, and, being indebted, said Thorns-bury did not want to appear as being the owner of any part of it, and had the deed made to Shackelford for his undivided interest; that afterwards the deed was made to Harvey, but not to be recorded, lest what is called "dowry" therein should be sold for debts of Thorns-bury, particularly the debt of plaintiff; that Thorns-bury procured the deed to be made to Harvey with intent to delay, hinder and defraud his creditors, especially plaintiff; that Harvey had full notice of the fraudulent intent before and at the time of the making of the deed, and was a party to such fraud; that, many years ago, plaintiff loaned said Thorns-bury some money, and long before said deed to Harvey was made; that on the 27th of January, 1885, he obtained a judgment before Lewis Haymond, a justice, for three hundred and eighty-two dollars and thirty-four cents, with interest from that date, and costs, two dollars and five cents; that he had the same docketed in the clerk's office of Taylor county court, and that the same is a lien on the fifty and one-half acres belonging to Thorns-bury; that the lien for seven hundred and sixty-six dollars and sixty-seven cents retained in said deed was not for any purchase money due or to become due to the vendors, or any person, but was fraudulently retained in said deed to deceive and mislead, and caused to be done by Thorns-bury with the intent to hinder, delay, and defraud plaintiff and other creditors in the collection of their debts; that Shackelford held said land as a trustee for said Thorns-bury Bailey, and not otherwise, it being the land of said Thorns-bury from the date of purchase from Despard; and praying that said deed to Harvey A. Bailey be declared fraudulent and void as to plaintiff's judgment, that said fifty and one-half acres be sold, *etc.*, and for general relief.

Thornsbury Bailey filed his answer, denying the allegations of the bill, and alleging that he has no interest in the land purchased as alleged; that long before the purchase by his sons John and George and his son-in-law, Shackelford, from Despard, he was a poor man; and that, since the purchase, "he has remained poverty stricken, and was not at any time during this period financially able to make the purchase of said land, or any part thereof, as charged in the bill, and in fact did not do so, and had nothing to do with making the contract of purchase with the said Despard; that he furnished no money towards the payment on the land, and paid none on the same"; that he was not a party to the transaction; and makes complete denial of all the material allegations in the bill. Defendants John W. and George Bailey filed their joint answer, and Harvey A. Bailey his separate answer, all denying the allegations of the bill.

The plaintiff, in support of his bill, filed the depositions of E. S. Shackelford and John Lucas, the justice who took the acknowledgment of the deed of March 6, 1883, to Harvey A. Bailey. Shackelford testifies that John and George Bailey and himself went together to make the purchase from Despard, and made the contract for it; that, in the spring following the purchase, the boys were all at home with the old gentleman, and they all went onto the land together; they built one house at first, and all lived in it together until John and George got married, when they built separate homes; that Thornsbury has ever since continued to reside there; that his understanding is that they made a division of the land, and held and used it in separate pieces, and in answer to the question, "Why did you join in the deed to Harvey A. Bailey for the part of the land that Thornsbury Bailey built his house on and occupied?" Shackelford says: "There were several reasons. I intended Thornsbury to have a home while he lived, for him and the old lady. They were very poor. I asked old Daddy Bailey who I should make that deed to, and he said, 'Make it to Harvey.' I asked him how he wanted it made. He said to have his maintenance reserved in the deed. I said to him, if that was done, they would sell it for his debts, and he would be thrown out of a home. He then said, 'Let the deed just be made to Harvey,—a clear deed.'

I objected to that, and told him that Harvey might marry a woman that the old fellow could not live with, and might throw him out of a home. They then agreed to make a silent deed, not to go to record until after the old man's death, and I agreed to it,"—and says the last payment he made on the land to Despard or his agent was fifty dollars fetched to him by Thornsby Bailey, but he does not know where he got it. Witness Lucas testifies that he got the word through Mr. Shackelford to prepare the deed, which was written and acknowledged at Thornsby Bailey's dwelling house, on the land in controversy; that he had a plat of the whole tract of the Despard land with three divisions laid down on it and there were three deeds written and executed that day for the three division,—one to John W. Bailey, one to George Bailey, and the other to Harvey A. Bailey,—and Shackelford and his wife joined in all of these deeds; that he was directed by E. S. Shackelford as to the terms in the deed to Harvey A. Bailey, and the terms and provisions of the deed were talked over and agreed on at Bailey's on that day; and that it was agreed by Shackelford and Thornsby Bailey and Harvey A. Bailey for the deed not to be recorded until the death of Mr. Bailey. "There was no reason given, but it was intimated to me that there * * * debts, and that Mr. Bailey had nothing, and he wanted to procure a home for him." Witness Lucas said he did the carpenter work on the house first built on the land, and was paid for it by George Bailey; that Thornsby Bailey had never worked very hard since he had been there; that he had been troubled with the rheumatism. Thornsby Bailey testified that he had nothing to do with the purchase from Despard; that he paid no part of the purchase money, and had no interest in the purchase, but that the boys, in making the deed, had reserved a lifetime interest in it, because he had no home, and was not able to buy one; that the fifty dollars he gave to Shackelford to pay on the land was the boys' money, that they had drawn as the proceeds of timber that they had taken off the place. The testimony of both John and George Bailey is that Thornsby paid no part of the purchase money, and had nothing to do with the contract or purchase; and it is very clear from the whole testimony in the case that Thornsby was rheu-

matic, able to work but little, very poor, and not able to purchase a home or to have kept one without the aid of his sons and son-in-law; that the purchase money to Despard was paid out of the proceeds of timber taken off the land, except the balance of some three hundred and seventy-five dollars yet unpaid when the deed was made to Harvey A. Bailey, and which he assumed and paid, which, together with the provision in the deed imposing upon him the maintenance and support of his parents, Thornsby and Catherine Bailey, during their natural lives, was a fair consideration for the land conveyed to him, and, if it were not a full consideration, no one has a right to complain, as Thornsby had no interest, either equitable or legal, in the property to be affected by the claims of his creditors, but simply a provision made by his children for the support of himself and wife in their declining years. There is no allegation in plaintiff's bill as to when the indebtedness of Thornsby Bailey to him was created. The presumption is that it was long after the purchase from Despard, in February, 1869, as suit was not brought on it until 1885, fifteen years thereafter.

"A plaintiff who alleges fraud must clearly and distinctly prove the fraud alleged in his bill. The *onus probandi* is on him, and if the fraud is not strictly and clearly proved, as it is alleged, relief cannot be granted, although the party against whom relief is sought may not have been perfectly clear in his dealings." *Harden v. Wagner*, 22 W. Va. 356, 366; Kerr, Fraud & M. 382; *Gibson v. Randolph*, 2 Munf. 310. "Whenever the courts permit parol evidence to be received to establish a trust, they always require such evidence to be clear and unquestionable, to produce such result." *Troll v. Carter*, 15 W. Va. 567, Syl. 7; *Coleman v. Parran*, (decided at this term) 28 S. E. 769.

Appellant charges in his bill "that said Ephraim S. Shackelford held said land as a trustee for said Thornsby Bailey, and not otherwise, it being the land of Thornsby Bailey from the date of the purchase from Despard," and says in his brief: "The bill was taken for confessed as to Shackelford, who purchased the third of the land for Thornsby, and who conveyed the legal title to Harvey." Why defendant Shackelford failed to answer the bill is not clear and appellant makes him his witness, and shows by him

that Thornsburly had nothing to do with the purchase from Despard, and that he was very poor, and not able to provide himself a home. The most that can be said from the evidence is that the support of Thornsburly and Catherine Bailey is made a part of the consideration for the conveyance of a tract of land in which Thornsburly had no interest, and never had. "An agreement to maintain and support another is a valuable consideration, and will sustain a transfer of property." *Keener v. Keener*, 34 W. Va. 421, Syl. (12 S. E. 729). Appellant utterly failed to establish the fraud or the trust alleged in his bill. There is no error in the decree complained of, and the same is affirmed.

BRANNON, JUDGE (*dissenting*).

I agree, on second thought, contrary to first inclination, that Armstrong cannot subject the fee. He has not clearly established an express trust; that is, an agreement, at the time the two young Baileys and Shackelford purchased of Despard, that Thornsburly Bailey was to have the Shackelford interest, or any other interest. He is not shown to have any vested interest in the purchase. Any subsequent oral agreement would be invalid under the statute of frauds. And there can be no resulting trust: (1) Because it is not shown that Thornsburly Bailey paid any purchase money, except fifty dollars, and that was not his money, and there was no understanding that it was paid with intent to give him an interest; and (2) a resulting trust cannot arise *ex post facto*, but must arise at the time of the original transaction. If Thornsburly Bailey had an interest, Armstrong's judgment being docketed before the deed to Harvey Bailey was recorded, that deed would be void as to Armstrong's judgment; but a creditor is not entitled to more than his debtor had, and Thornsburly Bailey had no interest for the judgment to attach to. As Thornsburly Bailey had no interest, the agreement to keep the deed from record to avoid letting his creditors know of the reservation of a life estate would not make the deed void. They had a right to conceal the fact.

But I do not see how we can help subjecting the life estate of Thornsburly Bailey to the judgment. The deed warrants the land to Harvey Bailey and heirs forever, and

adds: "But, to secure the land, a dowry is hereby retained for Thornsbury Bailey and Catherine Bailey, his wife, during their natural lives." The grantors created a life estate for Thornsbury, and put in no words to protect it from Armstrong's judgment, and it was a lien on it. The clause was meant to reserve, not a mere support to Bailey, but to give him and his wife use and control during life, the right to occupy and take rents and profits, just as a widow holds possession and takes the whole profits during life. Hence the word "dowry." It meant nothing else. What else did it mean? The evidence of the parties shows they so understood the clause. This makes a life estate. One may be created by reservation as well as by grant. 1 Kerr, Real Prop. § 558.

Affirmed.

CAHRLLESTON.

Cox v. HORNER *et al.*

Submitted September 3, 1897—Decided November 17, 1897.

1. **EQUITY—*Bill in Equity—Dismissal.***

It is not error to dismiss petitions, filed in chancery suits, which fail to show sufficient equitable grounds for the relief sought thereby. (p. 788.)

2. **DEED OF TRUST—*Grantor—Rents and Profits.***

Unless otherwise stipulated, the grantor in a trust deed is entitled to the rents of the property conveyed until the trust is foreclosed by sale, or a decree is entered in a foreclosure suit sequestrating the rents. (p. 788.)

3. **MARRIED WOMEN—*General Creditors—Rents and Profits.***

The general creditors of a married women can only subject the rents of her real estate to the payment of her debts so long as she is legally entitled to the same. (p. 789.)

4. **MARRIED WOMEN—*Equity of Redemption—Trust Creditor—General Creditors.***

A married woman, who has conveyed her real estate to a trustee to secure a debt fully equal to, or largely in excess of its value, may surrender her valueless equity of redemption to the trust creditor, to avoid expense of a sale or the

cost of a suit, without detriment to her general creditors. (p. 790.)

5. TRUST CREDITOR—*Married Woman—General Creditors' Suits.*

When a deed of trust creditor has become the *bona fide* owner in fee of a married woman's real estate, he has the right to intervene in a suit instituted by a general creditor of such married woman seeking to rent such property, for the purpose of resisting such renting. (p. 790.)

Appeal from Circuit Court, Hampshire County.

Bills by H. H. Cox against Sallie L. Horner and others. From a decree dismissing his petitions to set aside a decree of seizure and sale, W. W. Wall appeals.

Reversed.

ALEXANDER & ALEXANDER and FOREST W. BROWN, for appellant.

W. B. CORNWELL and R. W. MONROE, for appellee.

DENT, JUDGE:

W. W. Wall complains of certain decrees of the Circuit Court of Hampshire County in the case of H. H. Cox, plaintiff, against Sallie L. Horner *et al.*, defendants. The plaintiff filed his several bills against the defendant Sallie L. Horner, a married woman, for the purpose of subjecting her separate personal property, and the rents of her separate real estate, to the payment of a debt of six hundred and fifty dollars he had against her. After the court had seized and sold her separate personal property, the appellant, to wit, on the 27th day of May, 1895, filed his first and second petitions, which the court, to wit, on the 5th day of March, 1896, dismissed. The first petition sets up the ownership to the personal property under a written contract or bill of sale, and alleges that possession was not taken thereunder, but that it remained in the grantee; hence the contract is *prima facie* void as to the plaintiff's lien, fully consummated by seizure and sale of the property. This is not a case of oral sale and delivery of property of a married woman before the seizure thereof at the suit of a creditor, as in *Bruff v. Thompson*, 31 W. Va. 16 (6 S. E. 352). The petition, on its face, only makes out a case which is presumptively fraudulent in law, and it does

not in any manner negative such presumption. On the contrary, it fortifies it by the allegation "that by his permission said property has remained in her possession ever since said time, but subject to his title and right to the possession thereof whenever he might see proper to take it into his possession." It fails to allege that petitioner paid a valuable, or any, consideration, or to in any manner excuse non-delivery. Hence the petition was insufficient in law, and the court committed no error in dismissing it, as it only made out the plaintiff's right to subject the property. *Poling v. Flanagan*, 41 W. Va. 190 (23 S. E. 685); *Curtin v. Isaacsen*, 36 W. Va. 391 (15 S. E. 171).

The second petition set up the fact that the defendant Sallie L. Horner was indebted to the petitioner in the sum of five thousand dollars, with interest from the 7th day of March, 1892, secured by a deed of trust executed by the said Sallie L. Horner and husband on the real estate in controversy on said 7th day of March, 1892, and duly recorded on the 22d day of March, 1893; alleges that such trust is a prior lien to any claim that plaintiff may have to such real estate; and prays that the same may be rented to pay such lien until it can be sold for the satisfaction thereof. This petition is demurrable, in that it fails to make proper parties thereto; and it is fatally defective, in that it fails to set out any grounds for equitable relief. According to the terms of the deed of trust, the petitioner had the right to have the same executed at once by the trustee, in so far as the petition shows, and thereby relieve himself more promptly and speedily than a court of equity could possibly do. There is no allegation that the corpus of the real estate is an insufficient security for the debt, or that the trustee is incapacitated from acting, or refuses to do so, or that any prior liens exist, or other excuse for equitable interference, except that a subsequent lienor is after the rents and profits, which, however, is not alleged to be to the depreciation of petitioner's security. "As a general rule, the grantor in a trust deed is entitled to the rents and profits until foreclosure, in the absence of a different stipulation in the deed. But, after a decree has been entered directing a sale, the beneficiary is entitled to a receiver for the rents and profits pending the further proceedings." 26 Am. & Eng.

Enc. Law, 880; *Bidwell v. Paul*, 5 Baxt. 693. The deed of trust in controversy did not convey, or give a lien on, the rents and profits; but they remained the separate property of Mrs. Horner, and liable to the suit of her creditors until a foreclosure by sale, or a proper suit was instituted to sell the same, showing the otherwise insufficiency of the security. The plaintiff was only seeking to appropriate the rents on which the trust creditor had not as yet acquired a lien, or the right of disposal; and it was therefore not proper to permit the latter to intervene in such suit, unless upon some just, equitable grounds. *Howe v. Stertz*, 26 W. Va. 555. It is possible that petitioner had the right to present his debt in the suit, especially after reference, as a simple-contract debt against Mrs. Horner; but this he was not asking, as it would have made him subsequent in priority to the plaintiff, and given him no relief.

After the court had disposed of the personal property, and rented the real estate for one year, beginning on the 1st day of April, 1895, and ending on the 1st day of April, 1896, and was about to rent it for the second year to the plaintiff, Cox, at the price of fifty dollars, the appellant, to wit, on the — day of May, 1896, presented his third petition, in which, in addition to the facts set up in his former petitions, he alleges that on the 30th day of March, 1896, with the consent of the parties thereto, under and by virtue of the trust deed he purchased the real estate at the price of three thousand five hundred dollars,—a sum much less in amount than his lien (credit to be given thereon),—of the trustee, and that on the 18th day of April, 1896, the trustee executed a deed conveying him the legal title, in which Sallie L. Horner and her husband, T. F. Horner, joined, thereby giving him complete title to the property; and he asks that he may be made a party to the suit, and allowed to defend the same, and that the orders renting the real estate may be cancelled, set aside, and annulled. The court, on objection of the plaintiff, refused to allow such petition to be filed. In this the court erred. There are three ways in which a deed of trust lien may be foreclosed,—by decree of court, by a sale by the trustee, and by a surrender of the property, and full conveyance thereof, by the grantors and trustee to the *cestui que* trust, in con-

sideration of the whole or a part of his debt. And the latter method, if *bona fide* and free from fraud, and for a full consideration, is just as effectual as either of the other ways, and operates just as completely to extinguish the right of the creditors of a married woman to subject such property to rental. To hold otherwise would be to impair the corpus of her real estate, and indirectly deprive her of the disposal thereof. She, having already conveyed away the corpus to secure her indebtedness, had nothing left therein but an equity of redemption, with the right to the rents until the foreclosure of the trust, and had a perfect right to surrender such equity, if valueless, to the *cestui que* trust; for in so doing she does not defraud her other creditors, as the *cestui que* trust could accomplish the same end by a sale by the trustee, or a bill in equity. *Johnson v. Riley*, 41 W. Va. 140 (23 S. E. 698). Such a transaction is subject to careful scrutiny. If it is free from fraud, and done for the mere purpose of effectuating the ends of the trust deed, it will be upheld. On the face of the petition, and the exhibit filed therewith, the transaction appears perfectly fair and free from fraud, and shows the petitioner to be the true owner of the property from the date of his purchase. Such being the case, he has the right to contest further renting of the property at the instance of the plaintiff. The rents, however, that accrued prior to his purchase, belonged to Mrs. Horner, and were properly sequestered for the payment of plaintiff's debt. The decree of the 23d day of May, 1896, is therefore reversed, and this cause is remanded to be further proceeded in according to the rules of equity.

Reversed.

CHARLESTON.

PRIM *et al.* v. MCINTOSH *et al.*

Submitted June 9, 1897—Decided November 17, 1897.

1. NON-NEGOTIABLE NOTES—Assignee's Rights.

The assignee of a non-negotiable note or obligation can take no rights which his assignor did not possess, and generally make no defenses he could not make. (p. 725.)

2. **PROMISSORY NOTE—Assignee's Rights—Fraudulent Conveyance.**

The assignment of a promissory note carries with it all the remedies of the assignor, including the right to attack a fraudulent conveyance, but this must be construed to mean to successfully attack such conveyance. (p. 795.)

3. **FRAUDULENT CONVEYANCE—Husband and Wife—Husband's Debts.**

Although a contract for the sale of a tract of land be made with a husband, yet it is understood between the parties at the time the contract is made that the purchase money is to be paid by the wife out of her separate estate, although the deed is made by the vendor to the husband, and a vendor's lien retained to secure the purchase money. Yet if the vendor knowingly receives the purchase money from the wife, in accordance with the original understanding, if such land is conveyed by the husband to the wife, in consideration of her payment of the purchase money, said vendor cannot attack such conveyance as fraudulent as to a debt due him from the husband as purchase money for a mule, of which the wife had no notice; neither can the assignee of such debt so attack such conveyance. (p. 795.)

Appeal from Circuit Court, Taylor County.

Bill by W. D. Prim and Frank Brown, partners as Prim & Co., against Elijah McIntosh and others, for cancellation of deed and the sale of land. From a decree for plaintiffs, defendant Mary A. McIntosh appeals.

Reversed.

W. R. D. DENT, for appellant.

ENGLISH, PRESIDENT:

W. D. Prim and Frank Brown, partners, under the firm name of W. D. Prim & Co., filed their bill in the Circuit Court of Taylor County against Elijah B. McIntosh, Anna McIntosh, Thomas Moore, and Mary A. Moore, his wife, and Joshua R. Cole, and alleges that on the 14th day of November, 1888, the defendant Elijah B. McIntosh purchased of Joshua R. Cole a parcel of land situated in Taylor County, on the waters of Valley river, and took a deed for the same, a copy of which deed they exhibited; that on the 13th day of January, 1890, while in possession of said land, said McIntosh executed to said Cole, from whom he purchased the land, his promissory note for the

sum of one hundred dollars, payable one year after date; that after the said note became due and payable, and before the same was paid, to wit, on the 14th day of November, 1892, said McIntosh conveyed said land to the defendant Thomas W. Moore, for the pretended consideration of four hundred and fifty dollars, when in fact no consideration was paid by the said Moore to the said McIntosh for the same, a copy of which deed was also exhibited; that on the 17th day of November, 1892 (only three days after the conveyance was made to said Moore), the said Moore and wife conveyed the same parcel of land to Anna McIntosh, the wife of the said Elijah B. McIntosh, for the pretended consideration of five hundred dollars, when in fact no consideration was ever paid for the same by the said Anna McIntosh to said Moore; that on the 11th day of March, 1896, they purchased the said note of the said Cole, and paid a valuable consideration for the same, as is shown by the assignment on the back of said note, which they file with their bill; that on the 30th day of May, 1895, a judgment was obtained on said note for the balance then due, which amounted to forty-one dollars and twenty-seven cents and two dollars and sixty-five cents costs; that on the 12th day of August an execution was issued on said judgment, and placed in the hands of a constable, who returned the same on the 4th day of October, 1895, "No property found"; that said judgment was duly recorded in the judgment lien docket of said county on the 14th day of October, 1895, as is shown by a copy of said docket which they filed. They charge that the deed from E. B. McIntosh to Thomas W. Moore was made without consideration, and to hinder, delay, and defraud the creditors of the defendant Elijah B. McIntosh; that the defendant Anna McIntosh and the defendants Thomas W. Moore and his wife, Mary A. Moore, entered into a conspiracy with the said Elijah B. McIntosh to cheat, hinder, delay, and defraud the creditors of the said Elijah B. McIntosh, and especially to defraud the plaintiffs; and they pray that the deed from said E. B. McIntosh and wife to the said Moore be set aside, canceled, and annulled, and that the deed from said T. W. Moore and wife to Anna McIntosh be canceled and held for naught; that plaintiffs' claim be decreed to them, and said land be sold, and the proceeds

applied to the payment of their claim and the costs of suit.

The defendants Elijah B. McIntosh and Mary A. McIntosh, his wife, filed their separate answers to the plaintiffs' bill, putting in issue all of the material allegations of said bill, which answers were replied to, depositions were taken in the cause, and on the 16th day of January, 1896, a decree was rendered therein, holding that the deed of Elijah McIntosh and wife to Thomas W. Moore, dated November 14, 1892, and the deed of T. W. Moore and wife made to Anna McIntosh, dated November 17, 1892, are fraudulent and void as to the plaintiffs' judgment for the sum of forty-one dollars and twenty-seven cents and two dollars and sixty-five cents costs, with interest from the 30th day of May, 1895, aggregating the sum of forty-six dollars and fifty-two cents, and decreed that said deeds be set aside and held for naught as to said judgment of the plaintiffs, and directed that unless said Elijah McIntosh, or some one for him, pay to said W. D. Prim & Co. the sum of forty-six dollars and fifty-two cents, with interest from the 14th day of January, 1896, together with the cost of said suit, within thirty days from the rise of the court, a special commissioner therein appointed for the purpose should sell the real estate in the bill and proceedings mentioned, at the time and place and upon the terms therein specified, and report his proceedings to the court; and from this decree this appeal was applied for and obtained.

It is claimed by appellant that the court erred in holding said deed fraudulent and void without any proof upon the part of the plaintiffs, and in the face of full proof that the money to pay for said land was the separate estate of the appellant, derived by inheritance, which fact was made known to the original vendor, who was the assignor of the debt, and who assigned (without recourse) to Prim & Co., long after the conveyance was made to appellant, Mary McIntosh. Now, the plaintiffs allege that E. B. McIntosh executed a note for one hundred dollars, dated the 13th day of January, 1890, to Joshua R. Cole, from whom he purchased said land, payable one year after date; and that after said note became due and payable, and before the same was paid, to wit, on the 14th of November, 1892, the conveyances to Thomas W. Moore and from said Moore to

the appellant above mentioned were made, and on the 11th day of March, 1890, the plaintiffs purchased said note of Cole, for a valuable consideration; and that on the 30th of May the plaintiffs obtained a judgment for forty-one dollars and twenty-seven cents, the balance due on said note, and two dollars and sixty-five cents costs. This allegation is to a great extent not sustained by the evidence. The testimony clearly shows that the note assigned to plaintiffs was not for one hundred dollars but for sixty dollars, and was executed by E. B. McIntosh to said Joshua R. Cole for a mule, and bears date January 13, 1890. The purchase of this mule from Joshua R. Cole, although made after the conveyance of the land to E. B. McIntosh, was made more than five years before the balance of said sixty dollar note was assigned to the plaintiffs, and the conveyance to Mary McIntosh was made more than two years before the plaintiffs became the owner, by assignment, of the balance due on the note executed to said Moore by E. B. McIntosh for said mule. These conveyances were placed on record, and the plaintiffs thereby had notice of them, before they purchased, by assignment, the balance due on said note from said Joshua R. Cole. There was no fraud practiced upon Joshua R. Cole, from whom E. B. McIntosh purchased said land. He testified that he was informed by the parties and by appellant's father, James E. St. Clair, that the money to pay for the land was to come from her separate estate. Then said Joshua R. Cole retained a vendor's lien on the face of the deed to secure the unpaid purchase money, and it is shown that the first note has been paid, and about half of the second note, so that the purchase money is amply secured. The vendor's lien was not affected in any manner by the transfer to the appellant, and the fact that so great a portion of the purchase money has been paid, and that the vendor's lien secures the residue, shows there was no intention to defraud said vendor. The appellant, in her testimony, swears that she knew nothing of the existence of this sixty dollar note when the land was conveyed to her. The bill charges that these conveyances were made especially to defraud the plaintiffs. This, however, could hardly be, when the plaintiffs had no interest in the sixty dollar note, or any part of it, until more than two years after the conveyances were made. The as-

signor, Joshua R. Cole, had full notice that the purchase money for said land was to be paid by Mary A. McIntosh out of her separate estate, and full notice of the conveyance to her of the land, subject to his vendor's lien, long before he assigned the balance due on said sixty dollar note to the plaintiffs, W. D. Prim & Co.

Joshua R. Cole could not have successfully attacked said conveyance from E. B. McIntosh to Thomas W. Moore, and from said Moore to Mary A. McIntosh, as fraudulent; and, not being possessed of that right himself, he could not transfer it by assignment to the plaintiffs, W. D. Prim & Co. It is true, this Court, in the case of *Billingsley v. Clelland*, 41 W. Va. 234 (23 S. E. 812), said that "the assignment of a promissory note carries with it all the remedies of the assignor, including the right to attack a fraudulent conveyance"; but this, as a matter of course, must be construed to mean the right to successfully attack such conveyances; and if the assignor was not entitled to such remedy he could not transfer such right by assignment. In the same case it was held that "a conveyance of property from husband to wife, directly or indirectly, with fraudulent intent towards prior or subsequent creditors, will be held void as to such creditors." The conveyances must be made, however, with fraudulent intent. In the case under consideration the evidence is clear that the purchase money was furnished by the wife out of her separate estate, and there was no fraud in conveying to her what she had paid for. We find in 1 Pars, Cont. (8th Ed.) p. 237, the author says: "The action brought in the name of the assignor for the benefit of the assignee is open to all equitable defenses, but only to those which are equitable; that is, the debtor may make all defenses which he might have made if the suit was for the benefit of the assignor, as well as in his name, provided these defenses rest upon honest transactions which took place between the debtor and the assignor before the assignment, or after the assignment, and before the debtor had notice or knowledge of it. The same rule holds as to the equities existing between an assignor and his assignee in respect to a chose in action held for value and without notice by a subsequent assignee. The latter takes the exact position of his vendor. The assignee of a nonnegotiable obligation can take no rights which his as-

signor did not possess, and generally make no defenses he could not make." As we have seen, said Joshua R. Cole could not have successfully maintained a suit to set aside said conveyance to Mary A. McIntosh as fraudulent: neither could his assignee successfully maintain this suit. The decree complained of is therefore reversed, and, proceeding to render such decree as the circuit court should have rendered, the plaintiff's bill is dismissed, with costs.

Reversed.

CHARLESTON.

RIDDLE *et al.* v. TOWN OF CHARLESTOWN *et al.*

Submitted September 6, 1897—Decided November 17, 1897.

1. DEEDS—*Reservations in Deeds—Validity of Reservations.*

Stipulations, reservations, exceptions, or conditions in a deed, which are inconsistent with, and tend to depreciate or destroy, the estate or interest guaranteed, are void. (p. 798.)

2. DEDICATION—*Streets—Reservations in Deeds—Validity of Reservation.*

When an owner of real estate within the corporate limits of a town lays and plats the same off in town lots, streets, and alleys, and sells such lots with relation to such streets and alleys, granting to the purchasers the use of such streets and alleys, the same as though they were public streets and alleys in all respects, and throws them open to the use of the public, he will be considered to have dedicated the same to public use, although the deeds for the lots and such streets and alleys may contain a reservation to the grantor of any damages that may be recoverable against the municipality in case the bed of such streets and alleys should be thereafter condemned for public use, as such reservation is inconsistent with and repugnant to the nature of the estate or interest granted in such streets and alleys, and tends to the destruction thereof. (p. 798.)

3. EQUITY JURISDICTION—*Injunction—Remedy at Law.*

Equity will not enjoin municipal assessments, merely on the grounds of illegality or irregularity, when the municipality, in making such assessments, is not exceeding the constitutional or statutory limit of its authority, as the person aggrieved in such case has adequate remedy at law for his relief. (p. 799.)

48	796
46	546
43	796
48	186
43	796
52	400

43	796
54	209

43	796
58	495
58	495

43	796
61	517

Appeal from Circuit Court of Jefferson County.

Bill by Rebecca Hunter and others against the town of Charles Town and others. From a decree for defendants, plaintiffs appeal.

Affirmed.

W. H. TRAVERS, for appellants.

JAMES M. MASON, JR., for appellees.

DENT, JUDGE :

Rebecca Hunter and others filed their bill in chancery in the Circuit Court of Jefferson County against the town of Charles Town to prevent the authorities of defendant from laying a pavement along the eastern side of Samuel street extended, in so far as it abutted on plaintiff's property, and prevent the assessment of the expense thereof against the owners. A temporary injunction was granted, but on a final hearing was dissolved.

The contention of the plaintiffs is that there was no dedication of the street to the public, nor acceptance thereof by the town, and that the proceedings on the part of the council were otherwise illegal and irregular. The dedication appears to be clear beyond all controversy. The plaintiffs had the land laid off into town lots, extending Samuel street through their land to the land of others, who continued it on, with the aid of the county, beyond the corporate limits, to the public highway. It was thus used by the public for many years, and was worked by the town in a small way, until it was decided to grade it, put in a curb, and require the abutting owners to construct pavements along it. On receiving notice to this end, the plaintiffs immediately set up a claim of non-dedication, not that they wanted to or could close the street, but they desired to avoid payment for their portion of the pavement, and have damages against the town for the fee simple of the street. The principal ground relied on by plaintiffs in support of their contention is a reservation in certain deeds made by them as far back as the 20th of July, 1868, in these words: "But the said parties hereto of the first part do not hereby relinquish any claim to damages that may be properly recoverable in the way of

compensation from the corporation of Charles Town, should the same condemn for public use the bed of Samuel street as extended according to the plans of the said addition to Charles Town." The deeds contained, also, the following clause: "And the parties hereto of the first part covenant and agree with the parties of the second and third part to keep open for their use, in the same manner as a public street, the street known as 'Samuel Street,' fifty feet wide, from an alley twenty feet wide bounding the lot known as the 'Hotel Garden' on the south to the south boundary line of the said Rebecca Hunter's addition to Charles Town." The evident meaning of these two provisions is that Samuel street, so extended, is to be in all respects a public street, but the grantors reserve from the grantees any damages that may be recoverable off the town, should the town thereafterwards recognize it, for the benefit of the abutting owners, to be a public street, and improve it as such. According to the covenant with the purchasers of the lots, it cannot be closed up, abandoned, or vacated as a public street. This itself is a complete dedication to public use, and one which the lot owners could enforce if it was in any manner disturbed. Hence, to give the construction to these provisions insisted on by plaintiffs is to render them wholly inconsistent.

A reservation in a grant, inconsistent therewith, and which tends to defeat the purpose thereof, is void, as a repugnant condition. 13 Am. & Eng. Enc. Law, 798. To compel the town to pay for the mere privilege of improving a street already dedicated to public uses would be a travesty on justice. So that the strongest consistent legal construction the reservation can bear is that the lot purchasers were not to demand any damages from the town, but if, for any reason, damages were ever recoverable for the bed of the street, they should go to the grantors, and not the grantees. These provisions of these deeds must be held to be an original dedication of the street to public uses, which was followed by other deeds without such reservations, and also by a complete abandonment of the street to the public, until graded and ready for a sidewalk, and the abutting owners were notified to construct the same. If the provision was valid, instead of being void, for the purposes claimed by plaintiffs, by their long acqui-

esence in the use of the public they will be deemed to have abandoned the same. The dedication is so complete that the circuit court modified the injunction, as prayed, so as only to prohibit the authorities "from making a pavement on the east side of Samuel street extended through the property of the complainants, or along any portion thereof, and from charging or collecting any portion of the expense thereof from complainants, or from making the same a lien upon said property." This is the only injunction granted in the case, and from the order dissolving the same the appeal is taken.

The public, as represented by the town authorities, was not inhibited from grading or improving the street in any manner, except in so far as it was to be done at the expense of the plaintiffs. Afterwards the plaintiffs consented that the improvements should be completed by the authorities, reserving only the right to avoid payment or liability on their part on any legal or equitable grounds. So the whole case is narrowed down to the mere question whether the town or the plaintiffs shall ultimately bear the expense of the pavement along their abutting property. This, then, having resolved itself into a question of mere pecuniary liability, the law furnishes ample remedy. *Wilson v. Town of Philippi*, 39 W. Va. 75 (19 S. E. 553). General or local assessments of taxes illegal for want of notice or other irregularities furnish no sufficient grounds for equitable interference. *Douglass v. Town of Harrisville*, 9 W. Va. 162; *Crim v. Town of Philippi*, 38 W. Va. 122 (18 S. E. 466); *Christie v. Malden*, 23 W. Va. 667. Eliminating the questions of dedication and acceptance, and equity jurisdiction is entirely destroyed. The dedication and acceptance are both full and complete. It is because of the acceptance that plaintiffs complain. Taking control, grading, curbing, and notifying property owners to construct sidewalks, relieves the question of acceptance of all doubt. *Taylor v. Philippi*, 35 W. Va. 556 (14 S. E. 130); *Sturmer v. County Court*, 42 W. Va. 724 (26 S. E. 532).

The plaintiffs say the abutting land is farm land. They have sold lots on either side of it, and it is only farm land because the plaintiffs hold it at a high figure, because of its location on Samuel street, and its increasing value on account of the local improvements made and being made.

If placed on the market at a reasonable price, it would soon cease to be farm land. They share in the prosperity of public improvements, and should bear their just proportion thereof. The decree is affirmed.

Affirmed.

CHARLESTON.

WEBB v. BIG KANAWHA & O. R. PACKET Co.

(BRANNON, JUDGE, *concurring.*)

Submitted January 20, 1897—Decided November 17, 1897.

1. EVIDENCE—*Illegal Evidence—Reversal.*

When illegal evidence is admitted against the objection of a party, it will be presumed that it prejudiced such party; and, if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for reversal of the judgment. *Taylor v. Railroad Co.*, 33 W. Va. 40 (10 S. E. 29); *Insurance Co. v. Trear*, 29 Grat. 259. (p. 805.)

2. EVIDENCE—*Conflicting Evidence—Instructions—Error.*

When there is conflict of testimony, and evidence on one side supporting one theory, and evidence on the other side supporting another and conflicting theory, and the principles of law applicable to each theory are different, it is error for the court to give as instructions to the jury abstract propositions of law which are applicable to only one of said theories, without any reference in such instructions to the evidence in the case. (p. 808.)

Error to Circuit Court, Kanawha County.

Trespass on the case by Samuel L. Webb against the Big Kanawha & Ohio River Packet Company. Plaintiff had judgment. Defendant's motion to set aside the verdict and grant a new trial was overruled, and he brings error.

Reversed.

COUCH, FLOURNOY, PRICE & SMITH and BROWN, JACKSON & KNIGHT, for plaintiff in error.

WARTH & BRIGGS and MOLLAHAN & MCCLINTIC, for defendant in error.

43	800
46	119
46	543
43	800
48	24
43	800
49	418
43	800
62	146
f62	295
e62	709
43	800
f66	598

McWHORTER, JUDGE :

This is an action of trespass on the case, brought by Samuel L. Webb at May rules, 1895, in the Circuit Court of Kanawha County, against the Big Kanawha & Ohio River Packet Company, to recover damages for personal injury received on the defendant's steamer T. D. Dale on or about the 10th of December, 1894, while a passenger on said steamer on the Kanawha river, by the alleged careless and negligent handling by the employees of defendant of a stage plank, which was carelessly and negligently thrown upon one of the plaintiff's feet, mashing, bruising, and injuring it. The defendant appeared, and demurred to the declaration, and to each count, which demurrer was overruled. The case was tried before a jury on a plea of not guilty, at the March term, 1896. After the evidence was all in, the plaintiff submitted eight instructions, numbered 1 to 8, inclusive, to each and all of which defendant objected, which objections were overruled, and all of said instructions given to the jury, to which ruling of the court the defendant excepted. The defendant then asked nine instructions, numbered 1 to 9, inclusive, to the giving of which, and each of them, the plaintiff objected; but the court overruled the objections to instructions numbered 1, 2, 3, and 4, and permitted them to go to the jury, and sustained the objections to Nos. 5, 6, 7, 8, and 9, and refused to give the same to the jury; to which ruling of the court in refusing said last-named instructions the defendant excepted. The jury returned a verdict for the plaintiff, assessing his damages at four thousand dollars, when the defendant moved the court in arrest of judgment on said verdict, and to set aside said verdict, and grant it a new trial, on the ground that said verdict was contrary to the law and the evidence, and that it was excessive, and that the court misinstructed the jury, and refused proper instructions asked for by the defendant; and on the further ground of improper conduct on the part of a member of the jury, and of the plaintiff and some of his witnesses; and in support of said last-mentioned ground defendant filed the affidavits of L. A. Carr, J. M. Thomas, and E. A. Rogers, which affidavits are made part of the record, to which several motions, and each of them, plaintiff objected, and in support of his said objections filed the affi-

davits of Calvary Pauley (the juror), John Holland, W. J. McNealey, S. L. Webb, which are also made part of the record, which said motions in arrest of judgment and for a new trial the court overruled, and rendered judgment upon said verdict on the 2nd day of April, 1896; to which rulings of the court in overruling the motion in arrest of judgment and for a new trial, and in rendering judgment on said verdict, the defendant excepted, and obtained a writ of error that said rulings might be reviewed by this Court.

The first assignment of error is the overruling of the demurrer to the declaration, and to each count thereof. The declaration contains three counts, alleging that defendant is a corporation created and existing under the laws of the State of West Virginia, doing business in the said state as a common carrier, and having an office and place of business in said county of Kanawha; that "on and before the 10th day of December, 1894, the defendant was the owner and operator of a steamer known as the T. D. Dale, and as such was a common carrier of passengers, and was, to wit, on the 10th day of December, 1894, a common carrier for hire and reward to the defendant by and upon said steamer T. D. Dale, from the city of Charleston, in the said county of Kanawha, and State of West Virginia, to the city of St. Albans, also in the said county and state; and the plaintiff alleges that on the said date, to wit, on the 10th day of December, 1894, the defendant, as such common carrier, undertook to carry the plaintiff, and the plaintiff became and was a passenger in and upon the defendant's said steamer, T. D. Dale, for a certain fare and reward to the defendant in that behalf, to be safely carried from the said city of Charleston to the said city of St. Albans; but the defendant, not regarding its duty in that behalf, did not use due and proper care that the plaintiff should be safely carried by and upon said steamer T. D. Dale on said journey, but wholly neglected so to do, in this, to wit: that after the plaintiff had entered on the said steamer T. D. Dale, as such passenger, to be carried as aforesaid by the defendant, and while the said steamer T. D. Dale, was about leaving one of the wharf boats at said city of Charleston, and was about to start on the trip down the Kanawha river to the said city of St. Albans, to wit, on the

10th day of December, 1894, as aforesaid, at the county aforesaid, the defendant suffered a heavy stage plank to be negligently and without proper care so handled by the employes of the defendant operating and running the said steamer T. D. Dale that it fell with great force, and struck upon one of the plaintiff's feet, whereby one of his feet was greatly mashed, bruised, wounded, and injured, and whereby the plaintiff was otherwise greatly bruised, wounded and injured, and became and was sick, sore, lame, and disabled, and so continued and still is, and during all said time has suffered great pain, and was prevented from transacting his business, thereby being deprived of the profits of his said business, and suffering the losses occasioned by its neglect; and also did pay out divers sums of money, to wit, amounting to the sum of \$1,000, in endeavoring to be cured of the said injury." The second and third counts differ only a little in the manner of the infliction of the injury, but are substantially the same as the first, and laying plaintiff's damages at ten thousand dollars. The declaration fails to negative contributory negligence on the part of the plaintiff; but this Court has frequently held that such allegation is unnecessary, "that being a matter of defense to be alleged and proven, if it exist, by defendant." *Carrico v. Railway Co.*, 35 W. Va. 303 (14 S. E. 12); *Sheff v. Huntington*, 16 W. Va. 307; *Berns v. Coal Co.*, 27 W. Va. 285, point 2, syl. I have examined the declaration carefully, and fail to find any material defect, and the defendant points out none. I conclude, therefore, that the demurrer was rightly overruled.

The second assignment is that it was error to permit the plaintiff, Webb, to be asked and to answer question 9 as set forth in defendant's bill of exceptions No. 1, which question and answer, objections to same, and the ruling of the court thereon, are as follows: "Ninth question: Dr. Miller has testified that he advised you some three or four months after this accident to have an operation performed. Will you please state why you did not follow his advice? (To which question the defendant objected, but the court overruled said objection, and permitted the witness to answer said question, and the witness answered as follows): Ninth answer: The only reason was that I was too poor. I was not able to do so at that time. I am not yet. I was in-

formed by my physician, Dr. Miller, that I would have to be put under the influence of some kind of opiate,—chloroform or ether. He further informed me that it was a very dangerous operation for any one to undergo when one was subject to heart trouble. I had been waiting also to see if I could not get well without undergoing an operation, taking my chances of losing my life; still deferred the matter for those reasons; but most of which I would not have been able to stand the expense of going to Cincinnati. It was very expensive, so I was informed; that it would cost me two or three hundred dollars; also that I would have to take the chances of losing my life, and with the hope that it would get well itself if I deferred it. (To which answer the defendant objected, and asked the court to exclude the same from the jury, but the court overruled said objection and refused to exclude said answer from the jury.)” Plaintiff, in his answer, first gives as his only reason for not having the operation performed that he was too poor, was not able to do so at the time, and was not yet able (at the time of testifying); then proceeded to give in detail what his physician told him, and managed to so tell it that the jury would be led to infer that plaintiff was subject to heart trouble, without stating as a fact that he was. If plaintiff had contented himself with, as he says, the only reason for not having the operation performed,—that he was too poor, and had never become able,—and which was a full and complete answer to the question, although there might apparently be something in defendant’s objection that “it was very improper to permit him to parade his alleged poverty before the jury,” yet, in view of the effort of defendant, as plaintiff puts it, “to create the impression on the jury that the plaintiff’s continued disability was due to his own neglect or disregard of his physician’s advice that an operation would be necessary to make the injury get well,” it would seem to be right to hear plaintiff’s explanation of his apparent neglect to do what was necessary to have done; but it was clearly improper to allow him to go on, and state what the doctor said about the effect of chloroform, ether, *etc.*, and the danger of such “operation for any one to undergo when one was subject to heart trouble.” The tendency of his answer was to arouse the sympathy of the jury in his

favor and to the prejudice of the defendant. In *Berkely Peerage Case*, 4 Camp. 415, Mansfield, C. J., says: "In England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds." See also, 1 Whart. Ev. § 172. In *Hall v. Lyons*, 29 W. Va. 421, (1 S. E. 591), JUDGE GREEN says: "If a court admit evidence which it ought to exclude, against the protest of the party objecting to its admission, and a verdict is rendered against such party, it will be presumed that he was prejudiced thereby, and therefore such verdict should be set aside on his motion; and, if that be not done, this Court will reverse the case, unless it clearly appears from the record that the plaintiff in error was not prejudiced by the admission of the improper evidence, * * * and it appears that, excluding this improper evidence, the verdict is so plainly right that a different verdict ought, on motion, to have been set aside, and a new trial awarded." In *Taylor v. Railroad Co.*, 33 W. Va. 40 syl. point 3, (10 S. E. 29), opinion by JUDGE BRANNON: "When illegal evidence is admitted against the objection of a party, it will be presumed that it prejudiced such party, and, if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for reversal of the judgment; but, if it clearly appears that it could not have changed the result,—that, if it had been excluded the same result would have followed,—it would not be cause for reversing the judgment." So, also, Judge Moncure, in *Insurance Co. v. Trear*, 29 Grat. 259, says: "If the only objection to the evidence was its irrelevancy, and it could not properly have prejudiced the defendants, then the judgment ought not to be reversed for the error in not excluding it; for to authorize the reversal of a judgment for error in admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature as that its admission may have prejudiced the adverse party. If he may have been so prejudiced, even though it be doubtful whether in fact he was or not, that is a sufficient ground for reversing the judgment." See, also, *Hall v. Lyons*, 29 W. Va. 410, syl. point 2, (1 S. E. 582), and *Payne's Case*, 31 Grat. 855.

Third assignment: That the court erred in refusing to permit the time book kept by the witness E. A. Rogers,

who was the clerk of the steamer, showing the employes on the boat during the week, embracing the day on which the accident occurred, to be introduced in evidence to the jury, in order to show that plaintiff's witness Wesley Fields was not on the boat at the time of the accident. There is no error in this, and, if there was, it is not such as defendant can complain of. Witness states that the book shows that Fields was not on the boat, and he also states that the book did not include all the names of all the employes on the boat during the week in which the accident happened; that "there may be one or two that is not on there [on the book]; the rousters are not on there; the fireman's name and my name are not on there." So that, if the book had been introduced, not being a complete record, it would prove nothing that was not proved, unless it showed the name of Fields entered therein, in which case it would contradict the defendant's witness Rogers, who kept the book. But, even if the book had been proved to be a complete record of all the employes on the boat, and the keeper of such record was alive, present, and testifying, the book would be incompetent evidence to go to the jury.

The fourth assignment is that it was error to overrule the defendant's objections to plaintiff's instructions, and giving the said instructions to the jury, especially instructions Nos. 4, 5, and 6, which are as follows: No. 4: "The court instructs the jury that the law, in tenderness to human life, holds common carriers liable for the slightest negligence, and compels them to repel by satisfactory proof every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence." No. 5: "The court further instructs the jury that the Big Kanawha & Ohio River Packet Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting the plaintiff, S. L. Webb, upon his journey; and the slightest neglect against which human prudence and foresight might have guarded, and by reason of which his injury may have been occasioned, renders such company liable in damages for such injury." No. 6: "The court

further instructs the jury that the Big Kanawha & Ohio River Packet Company, as a common carrier of passengers, is held by the law to the utmost care, not only in the management of its boats, and handling of its stage planks or other apparatus by means of which passengers enter its boats, but also in performance of all other acts or duties necessary to the safety of passengers." The evidence introduced by the plaintiff tended to show: That on the 10th day of December, 1894, the steamer T. D. Dale landed at the lower wharf boat at the city of Charleston, with her head upstream. That several passengers went on board the boat at that point, among them the plaintiff, S. L. Webb. That said passengers entered upon said steamer from the wharf boat by means of a stage plank, which was some 12 or 14 feet long, 12 inches wide, and 2 or 3 inches thick. That there were a number of passengers ahead of the plaintiff as they passed over said stage plank, he being the last one to go upon the boat, except one man, who was behind him. That he walked off of said plank upon the lower deck, and turned towards the stairway to go up to the upper deck, but was delayed and impeded by the other passengers who were ahead of him; and when near the foot of the stairs the signal was given by some one on the boat to turn her loose and draw in the stage plank. Said plank was picked up by two colored men, deck hands on said steamer, and employes of the defendant, and thrown down, falling upon the instep of one of plaintiff's feet, seriously injuring it. Plaintiff went on home, and was under the care of physicians a long time. That the wound occasioned by the falling of the plank grew worse and worse, the bones became decayed, and at the time of the trial was still discharging matter, and that probably it would never become permanently cured without a surgical operation. That the plaintiff was an attorney at law and a justice of the peace, and was obliged for nearly a year to neglect his business at a loss of probably seventy dollars a month; and that he had spent a considerable amount for doctor bills, medicines, *etc.*, in endeavoring to cure his wound. The evidence for the defendant tended to show: That the steamer Dale came to the landing with her head down the river. That several passengers came on board after the said plaintiff;

and that the plaintiff, instead of going promptly up the stairway to the passenger deck as soon as he came on board, turned off the stage plank in the opposite direction towards the head of the boat, and stood upon the lower deck, talking to some one on the wharf boat, while the other passengers went on up to the passenger deck. That the boat was drifting down stream, when it became necessary to turn her loose quickly and draw in the stage plank. That signals were given for this purpose, and plaintiff was requested to get out of the way of the stage plank and of the employes in the discharge of their duties, but failed to do so. That the stage plank was drawn in by two white deck hands, in the usual and ordinary manner, by taking hold of the end next to the wharf boat, and sliding it back from the boat, letting the end which was held by the deck hands fall; and that when it fell it struck upon the nosen of the boat and bounced on plaintiff's foot, and caused the injury complained of. That under the rules and regulations of the steamer the upper deck was set apart for passengers, and they were not permitted to loiter around or remain upon the lower deck, but were to proceed, upon going on the boat, up the stairs to the passenger deck. That it was dangerous for passengers to stay on the lower deck, or upon the bow of the boat, because of the deck hands handling freight. That on the lower deck they were liable to get run into, fall overboard, and get in the way of swinging the stage plank in. That the plaintiff, Webb, had frequently traveled upon these boats as a passenger.

As abstract propositions of law, the instructions 4, 5, and 6 are correct, but are they applicable to the case at bar, where the doctrine of contributory negligence is involved? Are they not justly subject in some degree to the criticism of appellant that "they entirely ignore the evidence in the case, especially the evidence favorable to the defendant showing contributory negligence on the part of plaintiff, and that plaintiff had voluntarily placed himself in a position where he 'could not hold the carrier to the full measure of his responsibility for safe carriage'? Beach, Contrib. Neg. § 151." It is contended by appellant "that, where there is a conflict of testimony, there being evidence on one side to support one theory, and evidence on the other side to support another and conflicting theory, and

the principles of law applicable to each theory are different, it is error for the court to give as instructions to the jury abstract propositions of law, which are applicable to only one of said theories, without any reference in said instructions to the evidence in the case"; and it seems to me the proposition is sound. Such instructions are liable to mislead the jury. In *Fisher v. Railroad Co.*, 89 W. Va. 371 (19 S. E. 578), JUDGE ENGLISH, in discussing the following instruction: "The court instructs the jury that in the transportation of passengers a railroad company is bound to exercise more than ordinary care and diligence, and is liable for the slightest negligence against which prudence and foresight could have guarded,"—says: "In my opinion, the circuit court erred in giving it to the jury without qualification. While it is true that it is the duty of a common carrier of passengers to use the utmost care in providing for their safety, yet I can well see how a jury might be misled by the instruction referred to. To instruct the jury that in the transportation of passengers a railroad company is bound to exercise more than ordinary care and diligence is a proposition to which we can readily accede; but to add, without qualification, that it is liable for the slightest negligence against which prudence and foresight could have guarded appears to me to have a direct tendency to mislead the jury to the prejudice of the defendant, especially under the state of facts disclosed in this case, unless the jury had been further instructed that the plaintiff could not recover if he himself was guilty of contributory negligence. The facts proven in this case clearly show that the plaintiff was guilty of contributory negligence; and the instruction, taken by itself, leaving out any reference to the question of contributory negligence, would have a strong tendency to mislead the jury, and should not have been given." In the case at bar the evidence of contributory negligence is not so strong, perhaps, as in that case, yet there was considerable evidence tending to prove it which was properly before the jury, and the jury should have been left free to give such evidence the consideration to which it might appear to them to be entitled. "The court is not bound to give an instruction upon a mere abstract question, and, if it does so under circumstances calculated to mislead the jury, such an instruction will be error, for

which the judgment will be reversed." 1 Bart. Law Prac. 656. "If an instruction is given on an abstract question which may mislead the jury, it is an error for which the judgment will be reversed." *Pasley v. English*, 10 Grat. 236, point 3. Instruction No. 4 is purely an abstract proposition of law, good in a case where it is applicable, but calculated to mislead the jury under the circumstances of this case, as shown by the evidence. Instructions 5 and 6 are of the same character, and should not have been given without qualification. It is said by appellee that these instructions were approved in *Searles v. Railway Co.*, 32 W. Va. 370. This is true, but the facts in that case were very different from this, as will be readily seen on examining the case, the question of contributory negligence not arising therein, and so were properly approved.

Fifth assignment: That the court erred in rejecting defendant's instructions Nos. 5, 6, 7, 8 and 9, which are as follows: No. 5: "The court instructs the jury that, if they believe from the evidence that the upper deck of the boat was set apart for the passengers, and that under the rules of the boat passengers were expected and required, immediately upon going on board, to go on up to the upper deck, and not remain on the lower deck; and if they further believe from the evidence that the plaintiff, Webb, knew of said regulations, but did not proceed to the upper deck as soon as he might reasonably have done after going on the boat, but remained on the lower deck, and that the employes of defendant drew in the stage plank on the lower deck in the usual manner, and that plaintiff was standing in the way of said plank, and was injured by the plank falling on his foot, and that said injury was not inflicted upon him willfully or wantonly by defendant's employes,* then he can not recover in this action." No. 6: Same as above down to *; then as follows: "Then he can not recover unless they believe that said injury was the result of gross negligence on the part of defendant's employes." No. 7: "The court instructs the jury that if they believe from the evidence that the upper deck of the boat was provided for passengers, and that under the regulations of the boat, passengers were not allowed to remain on the lower deck, and that plaintiff was aware of the regulations, and that the employes of the defendant had certain duties

to perform on the lower deck, among which was taking in the stage plank, and that there was more or less danger to passengers who remained on the lower deck, growing out of the discharge of these duties of said employes, and that defendant was aware of the nature of said duties and of the danger attending their discharge; and if they further believe that plaintiff remained on the lower deck longer than was necessary after he went on board, and was injured while there,*—then he cannot recover in this action, unless they further believe that said injury was done in a willful or wanton manner by defendant's employes." No. 8: Same as above down to *; then as follows: "Then the plaintiff assumed all the risks incident to the discharge of their duties by said employes in the usual and ordinary manner, and if he was injured under such circumstances by the hauling in of the stage plank in the usual and ordinary manner, then he cannot recover, unless they believe that such injury was inflicted upon him willfully and wantonly." No. 9: "The court instructs the jury that, if they believe from the evidence that the upper deck of the boat was provided for passengers, and that under the regulations of the boat, passengers were not allowed to remain on the lower deck, and that plaintiff was aware of this regulation, and that the employes of the defendant had certain duties to perform on the lower deck, among which was taking in the stage plank, and that there was more or less danger to passengers who remained on the lower deck, growing out of the discharge of those duties by said employes, and that plaintiff was aware of the nature of said duties and of the danger attending their discharge; and if they further believe that plaintiff remained on the lower deck longer than was reasonably necessary to enable him to pass from the stage plank to the upper deck, and that he was injured while there by the pulling in of the stage plank,—then he cannot recover in this action, unless they further believe that said injury was the result of gross carelessness on the part of the defendant's employes."

Plaintiff contends "there was absolutely no evidence in the case" tending to prove that Webb "knew of the existence of the rule or regulation referred to in the instructions, and knew the nature of the duties to be performed by the employes of the boat, and the danger attending their

performance." This is true, except by inference drawn from the fact that Webb lived at St. Albans, on the Kanawha river, and from his own testimony. When asked, "Were you familiar with steamboats or steamboating?" he says, "Nothing more than as a passenger;" and when further asked, "You have lived at St. Albans, and have been more or less accustomed to going up and down to Charleston on boats?" he replied, "Yes, sir." Plaintiff was an attorney at law and justice of the peace, and at least a reasonably intelligent man, and it must be presumed that he had some knowledge of the regulations of the boat for the convenience and comfort of the passengers, as well as something about the duties of the deck hands on the boat. These things he must have known something about from the most casual observation in his experience as a passenger on such boats, and this presumption is sufficient to become an element of consideration by the jury in weighing the testimony submitted to them.

There is quite a conflict of testimony touching the actions of plaintiff involving the question of contributory negligence, as well as those of the employes on the boat, and as to the warnings of danger given plaintiff, *etc.* Even the testimony of the plaintiff himself is by no means free from conflict with itself. His theory is that the boat landed at the wharf, bow up-stream; that the stage plank ran from the wharf boat onto the bow of the steamboat above the steps which go up through the bulkhead to the upper deck. In answer to the forty-sixth question, plaintiff says, "The plank fell right at the foot of the steps, between myself and the steps," and that the plank struck his right foot some three or four feet from the end of the plank. This statement is in harmony with his theory of the position of the boat; but in answer to question 111 plaintiff says: "The plank was thrown. I was between the plank and the steps." Question 112: "Kind of facing the steps?" Answer: "I said my left side was rather facing to the steps. The plank came angling this way. That put me between the plank and the steps." Question 113, by the Court: "You mean that the plank was between you and the steps?" Answer: "I was between the steps and the plank when it was thrown." Question 114: "Was the plank between you and the bulkhead?" An-

swer: "No, sir." Question 115: "You were between the plank and the bulkhead?" Answer: "Yes, sir." And then afterwards again says that the plank was below him and between him and the steps. Wiley Hath, a witness for the plaintiff, says the boat backed down to the wharf boat; so that the inference is, her bow must have been upstream, while he does not say so. Yet he says the plank fell on the right side of Webb; that Webb was between the plank and the steps; that he was making for the steps, and the plank fell nearer the head of the boat than Webb was, and on the outside of him and to his right. If this be true, the bow of the boat must have been downstream. In speaking of the passengers coming onto the boat, witness Hath first says Mr. Webb came on first. Then, in answer to the question, "Was anybody behind him or anybody before him, that you know?" he says: "Mr. Webb came right in front of Mr. Dr. Holland. Major Holland was right behind him. There was another fellow in front of Mr. Webb. I do not know who he was. They all came in together;" and says again: "The crowd was in front of him [Webb], but nobody got on the boat after he did. He and Mr. Holland was the last one to come on the boat." Wesley Fields, another witness for plaintiff, who says that he was one of the men who let the plank fall on the plaintiff's foot, says that the boat was lying with head up stream; that some eight or ten people came on the boat; that Webb was among the first to come on; and, being asked, "Where were the other passengers that came on at the same time?" answered, "They were going on up the steps;" that Webb stepped off the stage plank next to the steps; they dropped the plank next to the steps; Webb was between the plank and the steps; saw the plank bounce on his foot; that there was no vacant space on the front end of the boat where the plank could have been thrown "unless you had laid it upon the oil barrels." For the plank to have been thrown on the right of Mr. Webb when he occupied his position between the plank and the steps leading to the upper deck, the boat must have necessarily been lying with her bow down stream. Mr. Webb was a passenger and the carrier owed him a higher duty in the way of protection from damages and injury than if he had been a stranger or mere trespasser. Whether, if his rela-

tion to the defendant had been that of a trespasser only, the instructions 5, 6, 7, 8, and 9 would be proper under the testimony submitted in the case, it is not necessary to consider here.

In view of the fact that the court gave to the jury, on behalf of the defendant, two other instructions, Nos. 3 and 4, as follows: "(3) The court instructs the jury that the mere fact that this accident happened on the boat of the defendant does not raise the presumption that such accident was occasioned through the negligence of the defendant, but, in order to warrant them in finding a verdict for the plaintiff, they must find from the evidence that said accident was caused by the negligence of the defendant, and the burden of proof is on the plaintiff to prove such negligence; and, even if they believe from the evidence that defendant's employes were negligent in drawing in the stage plank, by which the plaintiff was injured, still the plaintiff cannot recover if the jury believe that he was guilty of negligence which in any degree contributed to the happening of the accident. (4) The court instructs the jury that, even if they believe from the evidence that the employes of the defendant did not exercise due and proper care in taking in the stage plank, yet if they further believe that the plaintiff at the time failed to exercise such care and prudence as an ordinarily prudent man would exercise under similar circumstances, and that such failure on his part contributed in any degree to the happening of the accident and injury complained of as a proximate cause thereof, then he cannot recover in this action,"—which instructions fully protect the interests of the defendant in the premises, and go as far on the question of contributory negligence as the court could properly go under the evidence in the case,—I am of opinion that the instructions 5, 6, 7, 8, and 9 were properly refused.

Sixth. That "the court erred in refusing to arrest the judgment and grant a new trial (a) because said verdict was contrary to the law and the evidence; (b) because the court had misinstructed the jury, and refused proper instructions asked for by the defendant; (c) because of improper conduct of the juror Pauley and of the plaintiff and some of his witnesses, as shown by the affidavits filed by defendant in support of said motion." It is earnestly con-

tended by plaintiff that upon the whole evidence the verdict is sustained by a decided preponderance of evidence, and that "the court will not set aside the verdict on the ground that improper instructions were given, or proper instructions refused, not interfering with or affecting the preponderance of evidence, as such error would be deemed harmless; and that if, upon the whole evidence, the judgment is plainly right, it will not be reversed for errors of law which, if not committed, would not have produced a different result." As in *Bank v. Napier*, 41 W. Va. 481 (23 S. E. 800); also *Plate v. Durst*, 42 W. Va. 63 (24 S. E. 580), and *Cunningham v. Bucky*, 42 W. Va. 671 (26 S. E. 442). Taking the whole evidence together in the case at bar, it is not such that, if the jury had returned a verdict for the defendant, it must have been set aside as contrary to the evidence, and as plainly wrong. There is evidence to support a verdict either for the plaintiff or defendant, and the preponderance is not decided the one way or the other, and it is eminently a case for the most careful consideration of the jury, and for the jury alone.

In support of its motion to set aside the verdict and grant a new trial, defendant filed the affidavits of L. A. Carr, president of the defendant company, J. M. Thomas, and E. A. Rogers, alleging improper conduct on the part of Calvary Pauley, one of the jurors who tried the case; that he had had conversations about the case with one John Holland, a witness for plaintiff, at the house and table of J. M. Thomas, where they boarded during the trial. Juror Pauley wholly denies such misconduct on his part; says that he had no conversation touching the case, but only heard a remark made by Wilt Allen to E. A. Rogers about the case, when "Rogers started to say something, and seemed to recollect himself, and simply remarked that he would not say what he had intended to;" that juror "thought the remark improper, but, as that was the only reference to the case in any way, and the conversation stopped there, he said nothing, thinking it the proper course to keep out of and free from all such conversations." The statements made in all defendant's affidavits are denied and contradicted. The affidavit of Thomas states that the juror Pauley and John Holland, a witness for plaintiff, boarded at his house; that during the trial and before the

verdict he (Thomas) heard said Holland and Pauley talking about the case at the table, and affiant heard Holland say that Carr (meaning the Big Kanawha & Ohio River Packet Company) was rich, and should pay Webb, the plaintiff, ten thousand dollars for his injuries. Pauley, in his affidavit, denies emphatically having any conversation whatever with Holland concerning the case on trial, and has no recollection of having any conversation with him on any subject, and that he had no acquaintance with Holland, and only knew him by hearing his name called by others; and further stating that he heard no such remark as Carr being rich, and ought to pay Webb ten thousand dollars for his injury, made by Holland or any one else. Holland also by affidavit denies any such conversation. Thomas states in his affidavit that on Wednesday during the trial he was met by plaintiff, Webb, on the street, and asked by Webb if he knew how the juror Pauley stood,—what his feelings were in the case. Affiant replied that from what he had heard Pauley say in talking of the matter he thought the juror Pauley was in favor of him (Webb), and that said Webb then and there asked affiant to see the juror Pauley, and try and get him to give a verdict in his favor; but that affiant did not do so. This Webb, in his affidavit, denies, while he admits having met Thomas on the street, but claims that Thomas asked him about the case, and what he thought of the outcome. Webb replied he could not tell, and had no means of knowing. That Thomas said public sentiment was that plaintiff deserved a heavy verdict, and he hoped plaintiff would get a verdict for all he had sued for; then told Webb, without being solicited to do so, that Pauley, one of the jurors, would be for him; that he thought so from what he had heard him say. Webb asked what he had heard him say. His reply was that he could not remember it all; that he had tried to get the juror Pauley to say something definite, but had failed. That Webb then reminded Thomas that it was improper for him to talk to a juror, and cautioned him not to talk to Pauley about the case.

W. J. McNealey, a witness summoned for plaintiff, also made affidavit that he boarded during the trial at the house of J. M. Thomas; that he and Holland sat together

at the same table, and ate their meals at the same time during the whole time they were tending the said trial, and slept in the same room; that he is positive that at no time at the table at said Thomas' or any other place did he hear said Holland say that Carr was rich, and should pay Webb, the plaintiff, ten thousand dollars for his injury, or anything to that effect; and is positive that said Holland did not discuss the said case within his hearing while the juror Pauley was present, or he would remember it, knowing the said Pauley was a juror, and, knowing it to be improper conduct in any person to do such a thing. In his affidavit Carr says that he learned of such misconduct after the verdict of the jury, but fails to show affirmatively that his counsel was ignorant of such misconduct during the trial, and only by inference that he was himself ignorant of it. In *Flesher v. Hale*, 22 W. Va. 50, JUDGE SNYDER says: "When a party moves for a new trial on the ground of misconduct on the part of the jury, which took place during the trial, he must aver in his motion, and show affirmatively, that both he and his counsel were ignorant, until after the jury had retired, of the fact of such misconduct." *Thomp. & M. Jur.* §§ 428, 456, and cases cited. The appellant failed to bring itself within this rule, which is a very reasonable one. Affiant Carr, for and on behalf of defendant, says "that he learned the above matters [the matters stated in his affidavit] since the verdict of the jury," only speaking for himself, and does not even negative the fact that he might have known something of what was going on before, and does not "show affirmatively that both he and his counsel were ignorant of the fact of such misconduct until after the jury had retired." "The knowledge of the attorney in such case is the knowledge of the client." *Flesher v. Hale*, above referred to (page 49 and cases there cited). On the same page (49) JUDGE SNYDER says: "This rule proceeds upon the ground that a party ought not to be permitted, after discovering an act of misconduct which would entitle him to claim a new trial, to remain silent, and take his chances of a favorable verdict, and afterwards, if the verdict is against him, bring it forward as a ground for a new trial. A party cannot be permitted to lie by after having knowledge of a defect of this character, and speculate on

the result, and complain only when the verdict becomes unsatisfactory to him." *Selleck v. Turnpike Co.*, 13 Conn. 453; *Orrok v. Insurance Co.*, 21 Pick. 456; 8 Barn. & C. 417.

For the reasons hereinbefore stated, I am of the opinion that the court erred in overruling the motion to set aside the verdict and grant a new trial. Therefore the judgment rendered in this case on the 2d day of April, 1896, is reversed, the verdict set aside, and the case remanded for a new trial to be had therein.

BRANNON, JUDGE (*concurring*):

I agree to reverse the judgment. I desire to say, however, that I do not deem the evidence elicited under question 9 to plaintiff, and held error in the foregoing opinion, as sufficiently material for reversal. I do not regard plaintiff's instructions Nos. 4, 5, and 6 improper. They are not abstract. There was evidence enough, surely, pertinent to their hypotheses, to save them from that impeachment. Nor were they what we may call partial instructions; that is, specifying certain facts as supposed to be proven, and telling the jury that, if proven, the verdict must go for the plaintiff, ignoring other facts in the case. Though the case involved contributory negligence, that did not render these instructions improper, because the plaintiff had the right to deny the presence of contributory negligence, and to have the court lay down what would be the obligation of a common carrier, if the jury should think no contributory negligence was shown. And I think there was error against defendant in refusing defendant's instructions. The giving of certain instructions covering contributory negligence in a general sense would not exclude these, as a party has a right to specify certain facts as controlling the case, if they are proven, so they are all the material facts,—the controlling facts,—thus asking the jury to say whether those facts do exist, calling their attention to specific facts, and saying that, if they exist, they call for a verdict for him.

Reversed.

CHARLESTON.

WHITE v. EMBLEM, *et al.*(ENGLISH, PRESIDENT, *concurring.*)

Submitted June 3, 1897—Decided November 17, 1897.

43	819
44	209
45	465
43	819
46	737
43	819
62	460

1. JUSTICE OF THE PEACE—*Detinue—Verdict—Judgment.*

A verdict in an action for the recovery of personal property before a justice or on its appeal must find the value of the property, and of each article sued for, as in the action of detinue, and the judgment must do so. (p. 820.)

2. DETINUE—*Verdict—Judgment.*

A judgment in an action for the recovery of personal property before a justice, or on its appeal, or in the formal action of detinue, which is only for the sum found by the verdict as the value of the property, is erroneous. It should be for the property, if to be had, and, if not, then its value. (p. 820.)

3. PLEADING—*Error.*

It is not reversible error that there was no plea or issue in an action before a justice, either in the justice's court or on appeal, where there was a full trial as if on plea and issue. (p. 819.)

Error to Circuit Court, Ohio County.

Action by David White against James and W. T. Emblem. Plaintiff had judgment. Defendants brings error.

Reversed.

B. B. DOVENER, for plaintiffs in error.

JOHN A. HOWARD, for defendant in error.

BRANNON, JUDGE:

Action before a justice for recovery of personal property, and appeal to circuit court, and judgment for plaintiff. It appears there was no plea forming an issue in this case in either the justice's or circuit court, and JUDGE ENGLISH insists upon the reversal of the judgment for that cause, but the other judges do not agree to do so. In *Simpkins v. White*, 43 W. Va. 125 (27 S. E. 361), I gave my reasons for refusing to reverse the judgment in an action of unlawful entry before a justice for want of issue.

I would apply the same doctrine to any action before a justice. A formal action of detinue asserts that defendant unlawfully detains the property, and the general issue is *non detinet*, denying the unlawful detention. In formal common-law actions there are formal pleas and formal issues, and the jury is sworn to try the issue or issues; but there are no formal pleadings or issues in actions before justices, or on their appeal to the circuit court. The Code, in chapter 50, s. 49, abolishes, as to justices' courts, the forms of action in courts of record, and, of course, abolishes formal pleadings applicable thereto. If the defendants in this case had pleaded, they would simply have denied the allegation of unlawful detention of the property. By making defense they did this just as clearly as if they had filed a plea denying it, or pleaded *non detinet*. The jury was sworn to try "all matters in difference between the parties," thus covering all points of issue or controversy. It would seem to be over-nice to reverse this judgment for that cause when we see that a jury trial was had, just as if there had been a formal plea.

But a grave error in this case consists in the facts (1) that the verdict does not give the value of each of the several articles of property sued for, nor does the judgment; (2) the judgment is one for the recovery of a sum of money found by the jury as the gross value of all the property, whereas it should have been for the recovery of the specific property, if to be had, and, if not, then for the alternative value in money. The verdict must find the separate values of the property, and each article, if more than one is sued for. This is old law. 6 Am. & Eng. Enc. Law, 657; 2 Bart. Law Prac. 705. The judgment must correspond. Though the case be before a justice, where rigid proceeding is not required, still there must be such a verdict as will support such a judgment as the law requires; especially might we ask it on the appeal. The plaintiff has right to the particular property he has sued for, if to be had, and, if not, then its value; while the defendant has right to surrender the property, and not pay its value. This judgment denies the defendants this right, and makes them pay the money at all hazards. Therefore we reverse the judgment, set aside the verdict, and send the case back to the circuit court for a new trial.

ENGLISH, PRESIDENT (*concurring*):

I concur in the conclusion reached in this cause for the following reasons: This was an action of detinue, brought by David White, trustee, against James and W. T. Emblem, before H. C. Petermann, a justice of the peace of Ohio County, to recover the possession of certain furniture, and twenty-five dollars damages for the wrongful detention thereof. After hearing the testimony, the said justice dismissed the action at the cost of the plaintiff, and from said judgment the plaintiff appealed to the circuit court of said county. On the 11th day of October, 1895, the case was submitted to a jury, who found a verdict for the plaintiff, and fixed the value of the property sued for in the action at two hundred and twenty-five dollars, and also further found that they assessed damages for the detention of the property without saying what amount of damages they assessed, whereupon the defendants moved the court to set aside the verdict, and grant them a new trial, and further moved the court in arrest of judgment upon said verdict, which motion was overruled by the court, and judgment was given upon the verdict for the sum of two hundred and twenty-five dollars and costs, and from this judgment the defendants obtained this writ of error.

The first error assigned and relied on by the plaintiffs in error is that "the court erred in refusing to set aside the verdict and grant a new trial, the verdict not being in proper form, nor in any sense legally drawn or properly responsive to the issue." This assignment of error leads us to examine the record, and inquire what was the issue made up between the parties and tried by the jury. An examination, however, of the transcript returned by the justice by whom the case was tried, discloses the fact that no plea of any character was interposed by the defendants, or either of them. Now, while the provisions of our Code with reference to pleadings before a justice are extremely liberal, and such pleadings are not required to be in any particular form, they must be such as to enable a person of common understanding to know what is intended; and it is further provided that the pleadings may be amended at any time before the trial or during the trial, when, by such amendment, substantial justice will be promoted.

Yet some sort of plea must be entered making up the issue between the parties, and, where an appeal is taken to the circuit court, the statute provides that "the appeal may be tried upon the pleadings made up in the justices' court, or the pleadings may be amended before or during the trial of the appeal, when substantial justice will be promoted by the amendment." Code, c, 50, s. 169. In this case, however, no plea or amended plea appears to have been filed in the circuit court, and as matter of course no issue was made up. Was this error, and, if so, was it such error as the defendants could complain of? A case similar to this was before this Court, and is reported in *Ruffner v. Hill*, 21 W. Va. 152, which was an action of ejectment, and it was there held that, "if a circuit court enter up a judgment on the verdict of a jury sworn to try the issue joined in any case, criminal or civil, including an action of ejectment, where no issue had been joined or no plea filed by the defendant, such judgment would, for such reason, only be reversed by the appellate court." This writ of error was allowed upon the petition of the defendants, and it was their fault that the plea was not entered. This was an action of ejectment, and the statute prescribes that the defendant in that action shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration.

It was claimed by counsel in that case that the judgment ought not to be reversed, because the Code provides that "no other plea can be filed in an ejectment case except a plea of not guilty, and therefore it must be conclusively presumed that the jury was really sworn to try the issue on the plea of not guilty, though no plea was put in, and that the only issue that could be made up was the one actually tried, and it would be too technical to reverse because the formality of entering the plea of not guilty was omitted." JUDGE GREEN, however, further says: "These cases [referring to many he had cited from Virginia and West Virginia] abundantly show that the court has not reversed judgments entered upon such verdict, because there was any doubt as to the real issue which the jury tried, nor because the defendant might have made up some other issue if he had pleaded. * * * The real ground on which these decisions

rest is that by the common law the court has no right to make up the issue, and impanel a jury to try it; but the parties, by their pleading, must first come to an issue, and then it is tried by a jury. When, therefore, the record shows that the parties, by their pleadings, have not come to any issue, but nevertheless the record shows that the issue was tried, this issue must either have been illegally made up by the court, or, by a blunder, it must have been assumed to have been made up by the parties, when in fact it was not." And in speaking of the cases cited he further says: "In some of the cases we have cited the record showed distinctly what was the issue tried by the jury, and also that the verdict was distinctly responsive to such issue, and it was the only issue the parties in the particular case could have made had they, by the pleadings, made any issue; yet the judgments were reversed because no issue, so far as the record showed, had been formed. It has thus been held as absolutely necessary in every case that an issue shall be made up by the pleadings before a jury can be impaneled to try the cause." In the case of *Machine Works v. Craig*, 18 W. Va. 559, pt. 3, syll., it was held that, "where it does not appear by the record in an action at law that pleas were filed and issues joined, the verdict of the jury is erroneous, and should be set aside." See, also, *Railroad Co. v. Christie*, 5 W. Va. 325, where it is held that "it is error to swear a jury to try the issue joined when there is no issue." To the same effect, see *Railroad Co. v. Gettle*, 3 W. Va. 377; also *Williams v. Knights*, 7 W. Va. 355.

Sir Matthew Hale, followed by Mr. Justice Blackstone, in defining an issue says: "When, in the course of pleading, they come to a point which is affirmed on one side and denied on the other, they are then said to be at issue." And in 3 Bl. Comm. 313, it is said: "An issue is, when both the parties join upon somewhat that they refer unto a trial to make an end of the plea." In the case of *Syndor v. Burke*, 4 Rand. (Va.) 161, which was an action of detinue, there was no notice in the record of any plea or issue joined, but it was stated that a jury was sworn to try the issue joined. The jury rendered a verdict for a portion of the articles claimed by the declaration, and the court gave judgment accordingly. Judge Cabell, in delivering the opinion of

the court, says: "Although the record states that the jury was sworn to try the issue joined between the parties, yet it does not show that any plea was filed by the defendant, nor that any issue was in fact joined. The counsel for the appellee has exhibited the transcript of the order of the superior court made at a term subsequent to that at which the judgment was rendered, showing that the court received the evidence of the clerk that a plea had been regularly filed, and that issue was joined thereon, and directing the plea to be entered *nunc pro tunc*; but we cannot regard this transcript as any part of the record. * * * Without deciding any of the questions made in the argument, I am of the opinion to reverse the judgment upon the ground that no issue was joined between the parties." In the case of *State v. Douglass*, 20 W. Va. 771, it appears that the case was tried when no issue had been made up, and, although the case was presented to the jury precisely as though the issue had been made up, yet the ATTORNEY GENERAL conceded that, inasmuch as it appeared from the record that no such plea was entered by the prisoner, the judgment of the court below should be reversed; and the court held that this was a fatal error, and that the court could not, on such a verdict, render any judgment, and proceeded to set aside the verdict, reverse the judgment, and remand the case. So, also, in the case of *Brown v. Cunningham*, 23 W. Va. 109, it was held that "a judgment based on a verdict in an action of ejectment or in any other action, civil or criminal, will be reversed by the appellate court if the record shows there was no issue made up between the plaintiff and defendant by the pleadings in the case." Again, in the case of *State v. Brookover*, 42 W. Va. 292 (26 S. E. 174) this Court held that "it was error in the circuit court to hear and finally determine a controverted case, in the absence of express agreement to the contrary, without proper pleas filed and issues joined thereon."

It is true, this case originated before a justice of the peace, and was tried before the justice without any pleading, oral or written, so far as the transcript shows, and was brought by appeal to the circuit court, and there tried without any pleas or issue. Now, while it is understood that the practice before justices is, to some extent, a liberal one, yet the statute provides (section 50, c. 50, Code) that

the pleadings may be oral or in writing. If oral, the substance of them shall be entered by the justice in his docket; if in writing, they shall be filed by him, and a reference to them be made in the docket. Such pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. In section 169 of same chapter it is provided that the appeal may be tried upon the pleadings made up in the justice's court, or the pleadings may be amended before or during the trial of the appeal, when substantial justice will be promoted by the amendment. All lawful evidence produced in relation to the matter in difference between the parties shall be heard, whether such evidence was produced before the justice or not, and the cause shall be determined without reference to the judgment of the justice on the principles of law and equity. Section 50 provides that "the following rules of proceeding shall be observed in justices' courts:" The pleadings in these courts are first, the complaint by the plaintiff; second, the answer by the defendant." So it appears the law requires some pleading before the justice, either oral or written, and the docket of the justice must show what the pleadings were, otherwise they can not be amended in the circuit court. Neither can the case be tried upon the same pleadings unless it appears what they were; but in the case under consideration there was no pleading and no issue, either before the justice or in the circuit court. The statute does not prescribe what plea shall be interposed in the action of detinue, and we can not presume that any plea was filed or issue joined when the transcript of the justice and the record of the court are both silent in regard thereto. I am aware that this Court held in the case of *Simpkins v. White*, 43 W. Va. 125 (27 S. E. 361), that: "In unlawful detainer before a justice or on its appeal a verdict on full trial on the merits will not be set aside because there was no plea and issue. The statute puts in the plea of not guilty." And while that ruling may be correct, I am constrained to say it does not accord with much respectable authority in this and the old state, and it differs from the case under consideration in this: that the statute puts in no plea in an action of detinue, although it does in an action of ejectment, which was the

case of *Ruffner v. Hill*, *supra*; and my conclusion is from the authorities above quoted, and others I have been able to examine, that in an action of detinue originating before a justice, and appealed to the circuit court, where there is no plea or issue made up either before the justice or court, no judgment can be rendered upon the verdict obtained in the circuit court. Having arrived at this conclusion, I deem it unnecessary to consider the case upon its merits. The judgment complained of must be reversed, and a new trial awarded.

Reversed.

CHARLESTON.

WILSON *et al* v. Youst *et al*.

Submitted February 10, 1897—Decided November 17, 1897.

1. OIL—*Realty*.

Petroleum oil, as it is found in the cavities of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word "land." (p. 834.)

2. GUARDIAN AND WARD—*Sale—Lease*.

The only manner in which a guardian can lease or sell the land of his ward for the purpose of its development, or any other purpose, is in the manner prescribed by statute, under a decree of the court. (p. 834.)

3. TENANT FOR LIFE—*Oil—Remainder Man—Lease—Sale*.

The petroleum oil underlying a tract of land which has been devised to a life tenant who is in possession, and which is to go to certain infant children after the decease of the life tenant, may be sold, upon the petition of the guardian of said infants, under the provisions of chapter 82 of the Code, or leased; and the life tenant will be entitled to the interest on the royalty during the continuance of the life estate, and then the residue or corpus of the royalty will be paid to the remainder-men. (p. 835.)

4. OIL—*Lease—Sale*.

An oil lease, investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain *per cent*. thereof, is, in legal effect, a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises. (p. 839.)

43	826
44	305
45	810
43	826
50	347
50	384
50	397
50	399
50	405
43	826
52	128
52	---
5	7
5	5
5	52
43	826
53	213
43	826
54	99
54	536
43	826
57	281
43	826
59	621
59	624
60	645

Appeal from Circuit Court, Marion County.

Bill by Thomas J. Wilson and others against Susanna Youst and others. From a decree dismissing their bill, plaintiffs appeal.

Reversed.

JOHN BASSEL, CHARLES POWELL and W. P. HUBBARD, for appellants.

JOHN W. MASON, for appellees.

ENGLISH, PRESIDENT:

J. D. Youst, by his last will and testament, bearing date on the 29th day of November, 1881, devised his home tract of land, situated in Marion County, W. Va., to his wife, Susanna Youst, during her natural life, and at the death of said Susanna Youst said tract of land was devised to Hermania Wilson, the wife of Alpheus M. Wilson, during her natural life, to be held by her free from the control of her husband, Alpheus Wilson, as her separate property and estate, and to descend to her heirs at her death; stating in said will that it was his intention to give said home tract of land to his wife for and during her life, and after her decease to the said Hermania C. Wilson for and during her life, and at her death to descend to her heirs, but with the following charge, limitation and direction, viz.: That if the said Hermania C. Wilson should not survive his wife, so as to come into possession of said home tract of land, and dying during the lifetime of his wife, should leave, surviving her (said Hermania C. Wilson) no child or children, nor the descendants of any children, then, instead of said tract of land going to the heirs of Hermania C., he directed that one half of said home tract of land should, at the death of his wife, go to, and be the property of, her said husband, Alpheus M. Wilson, if living, and the other half to the heirs of his sister, Eliza Wade, and the heirs of his deceased brother, Nicholas B. Youst, by his first wife, *etc.*

This will was duly admitted to probate on the 14th day of March, 1889. Alpheus M. Wilson died on the 29th day of November, 1891, and left surviving him, by his wife, Hermania, three children—Thomas J., Jehu D., and Clarence L. Wilson. Another child (Stella May Wilson)

was born January 11, 1891, and died in April, 1892. After the death of her husband, Alpheus M. Wilson, his widow, Hermenia, was married on the 8th day of June, 1893, to one James W. Powell, by whom she had one child, named Minnie C. Powell, and died in November, 1893, leaving surviving her, her husband, said James W. Powell, and four children—three by the first husband, and one by the latter. On the 12th day of July, 1890, the said Susanna Youst, and Hermenia C. Wilson and A. M. Wilson, her husband, and Alpheus M. Wilson, as guardian of Thomas J. Wilson, Jehu D. Wilson, and Clarence L. Wilson, infant children of said Hermenia C. Wilson, leased said tract of land, containing two hundred and fifty-five acres, more or less, to the firm of C. E. Wells & Co., for the purpose of mining and operating thereon for oil and gas, for the consideration of one-eighth royalty for all oil removed, and two hundred dollars a year for the gas from each and every gas well drilled on said premises. On the ——— day of November, 1890, the said Alpheus M. Wilson, as guardian for Thomas J. Wilson, Jehu D. Wilson, and Clarence L. Wilson, infant children of Hermenia C. Wilson and Alpheus M. Wilson, filed a petition in the circuit court of Marion county, pursuant to section 12 of chapter 83 of the Code of West Virginia, praying the sale of the interest of his wards in the oil and gas underlying or contained in said tract of land; and such proceedings were had therein that on the 29th day of November, 1890, a decree was entered by said circuit court directing that said A. M. Wilson, as such guardian, should sell the oil and gas underlying said land, either at public or private sale, by making a lease of said land for oil purposes for a term of years, for which the lessee was to deliver one-eighth, of the oil as rental or royalty, one-third of which eighth was to be delivered to the said three infants or their guardian. It appears that in pursuance of said decree the guardian of said infants executed a lease of said land, or of the infants' interest in the oil therein, to C. E. Wells and others, who subsequently assigned said lease to the South Penn Oil Company, and reported said lease to the court, which was confirmed in December, 1890. It further appears that said South Penn Oil Company, proceeded at once to bore for oil from it; that by the 1st day of June, 1894,

the royalty of one-eighth of the oil obtained from said land amounted in value to the sum of twenty-two thousand dollars. Said Susanna Youst and Hermenia C. Wilson, shortly after the rendering of said decree, assigned two-thirds of said one-eighth of said royalty to one S. B. Hughes, who up to the 1st day of July, 1894, had received about fifteen thousand dollars as the two-thirds of said royalty thus assigned to him.

After the lease of said land for oil purposes was confirmed, another child was born to said Hermenia C. and Alpheus M. Wilson, which was named Stella May, and she was admitted by a subsequent decree of said court to share in said royalty; which last-named child was born on the 11th day of January, 1891, and died in April, 1892. Said Alpheus M. Wilson died on the 29th day of November, 1891. In 1893 his widow intermarried with one James W. Powell, by whom she had one child, Minnie C. Powell; and a few days after the birth of said Minnie C. Powell the said Hermenia Powell died intestate, leaving her husband, said James W. Powell, and four children; and in January, 1894, upon petition filed in the intermediate court, said Minnie C. Powell was admitted as a co-owner in the one-eighth of said royalty. Said Susanna Youst is still living; and the said infant children, Thomas J. Wilson, Jehu D. Wilson, Clarence L. Wilson and Minnie C. Powell, by their next friend, Harrison Manley, filed a bill in the circuit court of said county of Marion, attacking said proceeding as being erroneous and void so far as it was decreed that said infants should share equally with Susanna Youst and Hermenia C. Wilson, and Alpheus M. Wilson, her husband, in the value and production of the oil and gas in and under the land in said petition and exhibits described, giving to said infants the one-third of said royalty; claiming that, said oil being part of the real estate, the life-tenant during her natural life, was entitled to the interest upon the sum realized as royalty, and that said Hughes, as assignee of the life-tenants, should be compelled to account for all money received by him as royalty in excess of annual interest upon the one-eighth of the oil paid by said lessee, and praying the appointment of a receiver to collect said royalty during the life of said Susanna Youst, and that he be required to pay the interest annually upon the same to

said Hughes, and that the entire principal should at the death of said Susanna Youst be paid to petitioners. The complainants in said bill alleged that the decree of November 29, 1890, was based upon the supposition that the three children of said A. M. Wilson and Hermenia C. Wilson were the owners in fee simple of said land, subject to the life estate of said Susanna Youst and said Hermenia, and ignored the fact that other and different persons might be the heirs at law of said Hermenia at her death; and they further alleged that the circuit court of Marion county had no authority to take from the complainants, and give to said Susanna Youst and Hermenia C. Wilson, any part of the body of said real estate, as was done by said decree of November 29, 1890, and the subsequent decree confirming the sale to said Wells.

The South Penn Oil Company answered said bill, in which answer, after stating the manner in which it claimed the right to the lease of said tract of land for oil purposes, it alleged that said royalty of one-eighth of all the oil produced and saved from said land had been delivered to the Eureka Pipe Line Company, a common carrier of oil, in accordance with the rules and customs of the business, and in accordance with the terms and provisions of said contract, and the proceedings and decrees under which said interests were sold, and under which its right accrued to bore for and produce said oil, and that all of said one-eighth royalty of the said oil as was produced and saved from said land, except so much thereof as may remain unsold and in the custody of the pipe line company, had been delivered to S. B. Hughes, assignee and grantee of Susanna Youst and Hermenia C. Wilson, and to the guardian of said infants, in accordance with the said decrees and contracts. It denies every allegation of said bill that is in any way intended or calculated to raise any question affecting respondent's title to the oil and gas in said land, and the proper delivery and disposal of the one-eighth royalty of said oil to the persons entitled thereto according to the contracts and decrees of the court creating the title in respondent to such oil, and avers that it is not interested, as between the plaintiffs in the case and the defendant S. B. Hughes, as to how the royalty of one-eighth of said oil should be thereafter disposed of, but claims that so much

of said royalty as has been delivered to the said pipe-line company, or has been disposed of by the plaintiffs or the defendant S. B. Hughes, had been delivered in accordance with the provisions and requirements of said contracts and decrees entered by the court in said proceedings, which said decrees, respondent avers, fully protect said respondent in the delivery and disposition of said royalty of oil so made as aforesaid. Respondent further avers that the payment, delivery and disposal of said royalty of oil produced from said land was legally made, delivered and disposed of strictly in accordance with the requirements and provisions of said decrees of said court, to the persons legally entitled thereto under the provisions of said decrees; and it denies the right of the complainants to have said decrees, or either of them, set aside or annulled, or in any manner changed to such an extent as would in any way or manner affect the rights and interests of respondent, or in any way make the said respondent liable to account for such part of said royalty of oil as has been delivered or disposed of by said respondent to said S. B. Hughes under the provisions of said decrees and said contracts and deeds; and said respondent further averred that said orders and decrees under and by which said royalty of oils was delivered and disposed of were pronounced and entered in and by a court of competent jurisdiction, and in and by a court having jurisdiction of the subject-matter disposed of by said decrees. S. B. Hughes and the Eureka Pipe-Line Company also filed answers to said bill, putting in issue its allegations. The cause was heard on the 18th of July, 1894, and the court dismissed the plaintiffs' bill, with costs; and from this decree the plaintiffs obtained this appeal.

The first error assigned by the appellants is that "the circuit court, in its decree of November 29, 1890, erred in directing that two-thirds of the royalty or rental reserved by said decree should be paid or delivered to the said Susanna Youst and Hermenia C. Wilson, the life tenants, for the reason that the oil contained in or under said land was part of the body of the estate, as much as coal or other minerals that might have been contained therein, and the court could not, under the law authorizing a sale of lands held by the infants in a reversion, subject to a life estate, give a part of such real estate to the life tenant; the latter

being entitled only during life to the annual interest upon the fund realized from the sale or disposition of the infants' estate under the decree." In considering the questions raised by this assignment of error, and determining the rights of the respective parties to the record with reference to the matters in controversy, it is necessary to look to the source of their title.

The tract of land containing two hundred and fifty-five acres belonged to Jehu D. Youst at the time of his death: and when we look to his will for the purpose of ascertaining what disposition he made of it, and when he comes to make plain his intention respecting said tract of land, he says: "My intention being to give said home tract of land to my wife for and during her life, and after the decease of my wife to the said Hermenia C. Wilson for and during her life, and at her death to decend to her heirs, but with the following charge, limitation, and direction, viz.: That if said Hermenia C. Wilson should not survive my wife, so as to come into possession of said home tract of land, and, dying during the life of my wife, should leave surviving her (said Hermenia C. Wilson) no child or children, nor the decendants of any children," then, instead of said home tract of land going to the heirs of said Hermenia C., he directs that one-half thereof shall go to said Alpheus M. Wilson, if living, and the other half to his sister, Eliza Wade, and the heirs of his deceased brother, Nicholas B. Youst, by his first wife. Under the plain provisions of this will, then, Susanna Youst took a life estate in the two hundred and fifty-five acre tract of land, and Hermenia C. Wilson took nothing during the lifetime of said Susanna Youst; and, as it appears that said Susanna Youst survived said Hermenia C. Wilson, it follows that said Hermenia never took any interest in said tract of land. The said Hermenia C. Wilson, at her death, however, left the plaintiffs in this suit, her infant children, who, under said will, were entitled to said real estate, subject to the life estate of said Susanna Youst. At the time the death of said J. D. Youst occurred, no lease had been made of said land for oil purposes, and no well had been opened or commenced thereon. In March, 1889, however, said Susanna Youst, Alpheus M. Wilson, and Hermenia C. Wilson executed a paper purporting to be a lease of said land to T. M. Jack-

son & Co., for the purpose of mining and boring for oil, upon the usual terms. On July 12, 1890, the same parties, in their own right, and the said Alpheus M. Wilson, as guardian of his three children, Thomas J., Jehu D., and Clarence L. Wilson (Stella May not having been born), made another lease of said land for oil purposes to C. E. Wells & Co., who assigned to the South Penn Oil Company. At the fall term of the circuit court, 1890, a petition was presented, under section 12 of chapter 83 of the Code, praying a sale of his wards' land; and a decree was entered in pursuance thereof, directing the sale by said guardian, through the form of a lease of the oil under said land, for which the lessee was to pay a rental of one-eighth, which the court directed to be divided equally between Susanna Youst, Hermenia C. Wilson, and her three children,—one-third to the children, one-third to the said Hermenia C. Wilson, and one-third to Susanna Youst. Before the decree of November, 1890, was entered, said Susanna Youst assigned her interest in the one-eighth part of said oil to S. B. Hughes; and on December 2, 1890, Alpheus M. Wilson and his wife transferred their interest in said oil to S. B. Hughes. Now, said Susanna Youst had only a life estate in said real estate, and her rights with reference to said realty were the same as any other life tenant. No well had been commenced or completed on said land at the time of the death of her husband. Under the head of "Mines," 2 Minor, Inst. p. 147 (side page 128), the author says: "A widow is dowable of mines and quarries, but only of those which were opened and worked in the husband's lifetime, although what shall be regarded as an open mine or quarry is not always easy to define. It seems that, if any part of a bed or deposit of mineral matter has been excavated for the purpose of mining, the whole bed, and the strata lying under it, are to be deemed, for dower purposes, an open mine and that new pits or shafts may be sunk for the purpose of reaching it. Nor is it less open because the working has been discontinued. On the other hand, for a dowress or any other life tenant to open new mines is waste, which will be punished with damages, and, as being of irremediable injury to the reversioner, will be inhibited by injunction from a court of equity." In the case of *Crouch v. Puryear*, 1 Rand. (Va.) 258, it was held

that "it was not waste, in a tenant in dower of coal lands, to take coal to any extent from a mine already opened, or to sink new shafts into the same vein of coal." So, Washb. Real Prop. p. 208, states the law thus: "A widow is entitled to dower in mines belonging to her husband in fee, which may have been opened during his lifetime, whether within his own land or that of another. * * * But though she may work an open mine, under her claim of dower, to exhaustion, she may not open new ones, even within the land set to her a part of her dower."

The question is whether petroleum oil, as it is found in the rock beneath the surface, is part of the real estate in which it is found; and the same law that applies to the ownership of the surface and soil applies to it. This question has been passed upon by the courts of last resort in different states. Gould, in his valuable work on Waters, in section 291, says: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word 'land,' and is a part of the soil in which it is found. * * * A lease of land, for the purpose of mining oil, coal, rock, or carbon oil, passes a corporeal interest which is the proper subject of an action of ejectment; and proportionate share of the oil to be produced by an oil well is an interest in land, a parol sale of which is void under the statute of frauds." This question was before the supreme court of Pennsylvania in *Appeal of Stoughton*, 88 Pa. St. 198, and it was there held that: "A guardian has ordinarily power to lease any of his ward's property, of such character as makes it the subject of a lease; but without the approval of the orphans' court he can not dispose of any part of the realty. Oil is a mineral, and, being a mineral, is part of the realty; and a guardian can not lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of the corpus of the estate of his ward." Mr. Justice Gordon, in delivering the opinion of the court, said: "Oil, however is a mineral, and, being a mineral, is part of the realty. *Funk v. Haldeman*, 53 Pa. St. 229. In this it is like coal, or any other natural product which, *in situ*, forms part of the land. It, may become, by severance, personalty, or there may be a right to use or take it, originating in custom or prescription, as the right of a life

tenant to work opened mines, or to use timber for repairing buildings or fences on a farm, or for firebote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a 'lease' or 'deed,' it is, in effect, the grant of part of the corpus of the estate, and not of the mere incorporeal right. In the case above cited this is said to be so as to leases of coal lands for the purpose of ming, and there is no reason why the same doctrine should not apply to oil leases." This question was also before this Court in the recent case of *Williamson v. Jones*, 39 W. Va. 231 (19 S. E. 436), and it was held that "petroleum or mineral oil in place is as much a part of realty as timber, coal, iron ore, or salt water"; also, "that it is a part of the inheritance, and an unlawful removal thereof is a disherison of him in remainder, constituting waste, which a court of equity, in a proper case, will restrain and enjoin."

The plaintiffs in the case under consideration do not appear to be seeking to set aside the sale or lease of their interests in the two hundred and fifty-five acres of land in controversy, but they claim that the said Susanna Youst, being entitled only to a life estate in the land, had no right to bore wells and take petroleum oil from the land, and, not having that right herself (when no well had been bored thereon in the lifetime of her husband), as a matter of course she could not assign that right to any other person. Susanna Youst survived Mrs. Hermenia Wilson, and for that reason said Hermenia took no interest in the land or the oil contained therein. But while it is true that said Susanna Youst was not entitled to any portion of the oil contained in the land, and could not bore a well for the purpose of developing the same, yet she was entitled to the surface (that is, to its possession and use) during her lifetime, and could prevent any person from entering thereon for the purpose of drilling a well for oil or gas; and although this fact would not prevent the remaindermen, through their guardian, from filing a petition, under section 12 of chapter 83 of the Code, asking a sale of the oil underlying said land, and obtaining a decree for the sale thereof, upon a proper case being presented to the court, yet such decree would be useless in the absence of the consent of the life tenant, Susanna Youst, that the

party to whom the oil was sold might enter upon her possession for the purpose of putting down such wells as might be necessary to bring the oil to the surface. At the time of entering this decree the said Susanna Youst and Hermania C. Wilson were before the court, as well as the guardian and guardian *ad litem* for the infants; and the said Susanna Youst and Hermania C. Wilson consented that the petitioners might share equally with them in the value and production of the oil and gas in and under the land in their petition and exhibits described (that is, that said petitioners should have an estate in *presenti* of an undivided one-third of said oil and gas in and under said land,—the said Susanna Youst one-third, and the said Hermania C. Wilson one-third.) It is stated in the petition filed by A. M. Wilson, guardian for petitioners, that oil had been found in paying quantities on lands adjoining said two hundred and fifty-five acre tract, and numerous wells were being put down near to the lines of said tract, which would exhaust the oil underlying the same, and that it was necessary that wells should be drilled at once on said two hundred and fifty-five acre tract, or said remainder-men would be deprived of the oil underlying their land by said adjacent wells; and it is presumed that proof of these facts was before the court. It was also stated that neither petitioners nor said life tenants were pecuniarily able to put down a well, and unless a sale of the oil by means of a lease was made, they would, in all probability, be deprived of the oil therein without compensation, and it would promote the interest of said wards to have a sale of their interest therein; and the court (being of opinion that it was clearly shown by said petition and exhibits and the evidence adduced, considering the consent of Susanna Youst and Hermania C. Wilson and Alpheus M. Wilson, her husband, that the petitioners might together share equally with them in the value and production in the oil and gas in and under the land in said petition described as thereafter decreed and provided, that the interests of the said infant defendants would be promoted by a disposition or sale of their interest in the oil and gas as prayed for in said petition as thereafter provided and decreed, and that the rights of no person would be violated thereby) proceeded to decree a sale of said oil and gas, and directed

that the petitioners should have one-third thereof, and Susanna Youst and Hermania C. Wilson the other two-thirds.

On the first Monday in June, 1894, Thomas J. Wilson, Jehu D. Wilson, Clarence L. Wilson, and Minnie C. Powell, infant children of said Hermania C. Wilson, who sued by their next friend, Harrison Manley, filed their bill in the circuit court of Marion county against Susanna Youst, S. B. Hughes, the South Penn Oil Company (a corporation), and Harrison Manley, administrator of Hermania C. Powell, deceased, calling upon the said S. B. Hughes and said South Penn Oil Company to state how much had been paid to or received by said Hughes, as the assignee of said Hermania C. Wilson and Susanna Youst, or in any other capacity, of the royalty paid by said South Penn Oil Company as the lessee of said land, and praying that the decree of November 29, 1890, might be set aside, so far as it gave or attempted to give to three of the complainants one-third of one-eighth of all oil produced from said land, and gave or attempted to give any portion of said oil to said Susanna Youst and Hermania C. Wilson, or any other person; also, that there might be a decree against the said S. B. Hughes for all money received by him in excess of what would have been the annual interest upon the entire royalty of one-eighth of the oil produced from said land; also, for a decree requiring that all money paid and received for the one-eighth royalty of oil produced from said land be placed at interest during the life of said Susanna Youst, and directing that after her death the principal of such sums be equally divided between complainants; that said South Penn Oil Company and said Eureka Pipe-Line Company be both enjoined and restrained from paying or delivering to the said S. B. Hughes any further share, price, or portion of said royalty of one-eighth of the oil produced from said land, until such time as the rights of the complainants to said royalty should be ascertained and determined, and that a receiver be appointed to receive, sell and collect the proceeds of said one eighth or royalty of oil produced from said land during the pendency of this suit, or until such time as the rights of the complainants therein might be adjudicated. Such proceedings were had in this cause that on the 18th day of July, 1894, a final decree was rendered

in the cause dismissing the plaintiffs' bill, and from this decision this appeal was obtained.

The first error relied on by the appellants is that the circuit court erred in its decree of November 29, 1890, in directing that two-thirds of the royalty or rental reserved by said decree should be paid or delivered to the said Susanna Youst and Hermenia C. Wilson, the life tenants, for the reason that the oil contained in or under said land was part of the body of the estate, as much as coal or other minerals that might have been contained therein, and the court could not, under the law authorizing a sale of infants' lands held by the infants in reversion, subject to a life estate, give a part of such real estate to the life tenant, the latter being entitled only during life to the annual interest upon the fund realized from the sale of the infants' estate under the decree; and, second, for holding that such decree was not erroneous as against the appellants, and in dismissing their bill filed to correct said decree.

These assignments raise the same questions, and may be considered together; and, in doing so, let us refer again to the provisions of the will of J. D. Youst, by which he gave this tract of land to his wife, Susanna Youst, during her natural life. After the death of his wife, he gave said tract of land to Hermenia C. Wilson for life, and at her death the same was to descend to her heirs; and in the event that said Hermenia C. Wilson died during the lifetime of his wife, leaving no child, or the descendants of any children, then the one-half of said land was to go to Alpheus M. Wilson, if living, and the other half to the heirs of his sister, Eliza Wade, and the heirs of his deceased brother, Nicholas B. Youst, by his first wife, *etc.* At the time the decree of November 29, 1890, was rendered, both Susanna Youst and Hermenia C. Wilson were living. Susanna Youst was in possession of the land as a life tenant, and was then a widow; and, as we have seen, she had no right to open a mine on the land she held as life tenant, unless the same had been opened in the lifetime of her husband. This, however, had not been done; and, not having the right to open and work a mine that had not been opened in the lifetime of her husband, it follows that she could not confer that right upon another. Oil in place

under the land, as we have seen, has been held in this State to be a part of the realty, and as much so as timber, coal, iron ore or salt; that it is a part of the inheritance, and an unlawful removal thereof is a disherison of him in remainder, constituting waste, which a court of equity, in a proper case, will restrain and enjoin. See the case of *Williamson v. Jones, supra*. Now, can we sustain the decree of the circuit court of Marion county, rendered on the 29th day of November, 1890? Had said court any right to direct a sale of the oil underlying said land, by way of lease, and apportion the royalty arising from said lease equally between the life tenant in possession, the life tenant in expectancy, and the remainder-men, who were infants? Could the court change the character of the estate held by the infant petitioners from an estate in remainder to an estate in *presenti*, and could the court authorize Susanna Youst to receive the product of a mine opened on her estate for life, subsequent to her husband's death, and authorize Hermenia C. Wilson to receive one-third of the product of the oil wells drilled on said land, in which her estate was dependent on the death of Susanna Youst, to which she might never be entitled, and, as the sequel shows, never was entitled, for the reason that her death preceded that of Susanna Youst? These are questions which must be met and answered, in passing upon the validity of the decree of November 29, 1890. Now, if the court could properly decree a sale of the oil underlying this tract of land upon the petition of the infants, and the testimony showing it was to their advantage to make the sale, was it proper that the product of these oil wells (the royalty) should have been divided as it was? What entitled either of the life tenants to one-third of the royalty, and especially Hermenia C. Wilson, who never was entitled to a life estate, she having died before Susanna Youst? A case somewhat similar to the one under consideration is found in 174 Pa. St. 425 (34 Atl. 564), (*Blakley v. Marshall*). The syllabus reads as follows: "An oil lease, investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain *per centum* thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises. If the lessors in

an oil lease are life tenants and remainder-men, the life tenants are entitled to the interest on the royalties during life, and at their death the corpus of the fund, made up of the aggregate royalties, goes to the remainder-men." And this decision, as I think, propounds the law correctly. If the infants, in pursuance of their petition and the testimony adduced before the court, had the right to have the oil underlying the land in which they are interested as remainder-men sold, to prevent its being drawn from the land by adjoining wells, the law provides where the royalty shall go and what interest the life tenant shall receive. Was the division of the royalty in the manner provided for in the decree complained of, in any manner justifiable on the ground of expediency? That it was not is plainly indicated by the fact that there was no reluctance evinced by Susanna Youst in entering into the arrangement by which she received one twenty-fourth of the oil produced from the wells drilled on said land, as the portion to which she was entitled as life tenant. The fact that Susanna Youst showed no hesitation about leasing her interest in this land is manifest from her conduct in deeding all of her interest in the oil produced from said land to S. B. Hughes on the 28th day of November, 1890, three days before the decree was entered in the circuit court, which, by and with the consent of said Susanna Youst and Hermenia Wilson, allowed the infant children aforesaid to share equally with them in the royalty arising from the oil wells drilled upon said land. Susanna Youst had no right to drill an oil well on the land of her deceased husband, and, not possessing the right herself, she could not confer such right upon another. Neither could she consent to the sale of the oil. In other words, her consent would be utterly futile, so far as it supplied any legal foundation for the action of the court in said decree, in dividing the royalty arising from the oil produced on said land as it was; and yet the decree shows that Susanna Youst was present, by her counsel, consenting to the sale, although she had sold and conveyed all interest she claimed in the oil underlying said land three days before the decree was rendered, to S. B. Hughes.

Now, our statute (section 14 of chapter 83 of the Code) provides that if it be clearly shown by the petition, exhibits, and evidence adduced that the interest of the minor

will be promoted by the sale, and the court be of opinion that the rights of no person will be affected thereby, it may order a sale of the estate, or any part thereof, either public or private, on such terms and in such parcels as may be deemed beneficial to the minor, *etc.* The complainants, however, in their bill, do not seek to set aside the sale for any irregularities in the proceedings of the circuit court in reference thereto, but they claim that, if the court had authority to sell or lease said land for oil and gas purposes, it had no right to decree to said Susanna Youst and Hermenia Wilson, or either of them, any part of the principal of any sum realized from oil produced, or the royalty thereof, from said land, but that the said Susanna Youst, during her life, would have been entitled to receive the annual interest upon the principal realized from said royalty, and that the plaintiffs, the infants aforesaid, would have been entitled to the principal after the death of said Susanna, and in this contention I am of opinion that the plaintiffs were clearly right (following the decision of the supreme court of Pennsylvania in the case of *Blakley v. Marshall, supra*); and for these reasons the decree complained of, which dismissed the plaintiffs' bill, must be reversed, with costs, and remanded to the circuit court of Marion county, with directions to ascertain the amount of interest that accrued upon the royalties arising from the oil wells drilled on said land during the lifetime of Susanna Youst, which amount, when so ascertained, is to be paid to the assignee of said Susanna Youst; and after deducting said interest the remainder of the royalty is to be paid to Thomas J. Wilson, Jehu D. Wilson, Clarence L. Wilson, and Minnie C. Powell, plaintiffs in said chancery suit.

Reversed.

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ABANDONED WIFE.

A married woman who has been wholly abandoned by her husband, permanently residing in another state or foreign country, under the rules of the common-law, as settled by the various decisions of the various courts of the United States, is restored to all the powers of a *feme sole* as to her separate property. This rule has been extended, modified or abrogated by the statutory enactments of various states. *Buford v. Adair*, 211.

ABUSE OF POWER. See *Judge*; *Prohibition* 2.

ACCEPTANCE. See *Order*.

ACCOUNTING. See *Reference*; *Waste* 4.

ACT OF GOD. See *Municipal Corporations* 5.

ACTIONS.

1. A party cannot be both plaintiff and defendant in an action at law. *Sweetland v. Porter*, 189.
2. Where two contiguous buildings fall upon and crush a third, by reason of the co-existent and concurring negligence of the respective owners thereof to keep their separate walls in repair, the owner of the injured building may maintain a joint or separate suit against the owners of the defective buildings. *Johnson v. Chapman*, 639.
See *Fraudulent Conveyance* 4.

ACTIONS *EX CONTRACTU* AND *EX DELICTO*. See *Justice of the Peace* 2.

ACTION FOR USE.

Where a negotiable note is made payable at a particular bank, and such bank is also made payee, and said note is indorsed in blank by a third party, and a fourth party, on the day of the execution of said note, becomes the owner thereof, by paying the maker the cash therefor, and before maturity said

ACTION FOR USE—Continued.

note is indorsed to said bank for collection, and is subsequently duly protested for non-payment, said fourth party may sue in the name of the bank for his use and benefit, and recover judgment against said maker and indorser. *Bank v. Simmons*, 79.

ACTS OF THE LEGISLATURE.

- A mere clerical omission in the journal of either house will not vitiate an act of the legislature if there is sufficient on the face of the journal to show substantial compliance with constitutional requirements. *Price v. City of Moundsville*, 523.

ADMINISTRATION.

When the widow is defendant in a suit brought to subject the realty of a decedent to the payment of his debts, and she has not elected to take the value of her dower in money, her dower should be assigned before an out and out sale of the realty is decreed. *McKittrick v. McKittrick* 117.

ADMISSIBILITY OF EXPERT TESTIMONY. See *Expert Testimony* 4.

ADVERSE CLAIMS. See *Cloud on Title*.

ADVERSE POSSESSION.

1. Possession under a void deed is sufficient to give color of title as against the grantors, and to set in motion the statute of limitations, and the coverture of the appellant, who was the grantor, does not affect the question (*Irey v. Markey*, 132 Ind. 546, 32 N. E. 309), she being excepted from the disabilities mentioned in section 3, chapter 104, Code, as to her sole and separate property. *Randolph v. Casey* 289.
2. Mere naked possession of land without claim of right is no adverse possession, and, no matter how long continued, will not furnish a defense to an action or confer title. *Parkersburg Indust. Co. v. Schultz* 470.
3. One in adverse possession of land without paper title has adverse possession only to the extent of his inclosure or actual improvement. *Id.*
4. Possession by inclosure, to be adverse, must be such as to be exclusive possession, a real and substantial inclosure, an actual occupancy, which is definite, positive, and notorious, when that is the only defense against a legal title. Therefore a partial inclosure of land capable of total inclosure, leaving a part of its boundary open, is not sufficient. *Id.*
5. A party relying on adverse possession must show clearly all the requirements of the doctrine. *Id.*
6. Adverse possession is lost by break in its continuity, by abandonment, or other cause, before the bar of the statute is complete, and seisin is restored to the true owner. A subsequent

ADVERSE POSSESSION—Continued.

entry is a new disseisin, and cannot be added to the former possession. *Id.* 471.

See *Constructive Trusts* 1; *Co-Tenancy* 2.

ADVERSE TITLE. See *Estoppel* 2.

AFFIDAVIT. See *Depositions* 2.

AGREEMENT IN WRITING. See *Assignment*.

ALLOWANCE FOR IMPROVEMENTS. See *Title* 2.

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AMENDMENT AFTER APPEAL. See *Decree* 3.

AMENDMENT OF DECREE. See *Decree* 4; *Vendor's Lien* 6.

ANSWER. See *Equity Pleading* 2, 5.

APPEAL.

1. When a bill of exceptions is taken after all the evidence has been submitted, and it purports to set out all the evidence, the evidence set out in this bill of exceptions may be looked to in considering the questions raised in another bill of exceptions taken in the progress of the trial. *Klinkler v. Wheeling S. & I. Co.* 219.
2. If a plea be rejected, and no exception is made, it will not be considered in this Court. *Shank v. Town*, 242.
3. No error in a final or appealable decree will be considered upon an appeal not taken within two years from its date. *Shumate's Ex'rs v. Crockett*, 491.
4. This Court will not disturb the verdict of a jury, founded on conflicting testimony approved by the trial court, unless the evidence, as a whole, clearly and plainly preponderates against such verdict. *Sisler v. Shaffer*, 769.
See *Criminal Law* 1; *Commissioner in Chancery* 2; *Commissioner's Report*; *Decree* 3; *Justice of the Peace* 3.

APPEARANCE. See *Justice of the Peace* 3.

APPELLATE COURT.

Point 3 of syllabus, *State v. Lowe*, 21 W. Va. 782, approved. *Jarrell v. French* 457.

See *Fraudulent Conveyance* 3; *Reversal* 1, 2.

APPOINTMENT.

The case of *Thrasher v. Ballard*, 35 W. Va. 524, approved, but held not to be binding on the parties to the present litigation. *Buford v. Adair* 211.

APPOINTMENT OF RECEIVER. See *Corporations* 5.

ARBITRATION.

Where an order is made by consent in a justice's court, submitting the matter in controversy to arbitration, the submission is not revocable, except by order of the justice, under the statute, and that submission is a bar to a second suit for the same cause. *Riley v. Jarvis*, 43.

ASSIGNEE'S RIGHTS. See *Non-Negotiable Note*; *Promissory Note*.

ASSIGNMENT.

A written agreement entered into between said parties on the day said assignment was made, providing that if said third party had an offer for his interest in said property he was to give said grantor notice, and allow him to take the property at the price offered, if accepted within three months prescribed in the agreement, while it may confer upon said third party a power to sell the property, under the terms of said agreement, does not deprive the grantor of the right to redeem the property. *Shank v. Groff*, 337.
See *Deed* 4.

ASSUMPSIT.

In an action of *assumpsit* based upon a written contract, the defense to which is that the same was procured by fraud and misrepresentation, going to the whole action, the doctrine of recoupment of damages is not applicable. *Dillon Beebe's Son v. Eakle*, 502.

ATTESTING WITNESS. See *Wills* 3.

ATTORNEY AT LAW.

An attorney at law is an officer of the court, under clause 3, s. 27, c. 147, Code 1891. *State v. Hansford*. 774.

BAIL.

As to bail in a murder case. *Ex Parte Eastham* 637.
See *Habeas Corpus*.

BENEFICIARIES. See *Wills* 4.

BIAS OF JUDGE. See *Indictment*.

BILL IN EQUITY. See *Equity* 2; *Equity Practice* 3; *Remand for Want of Parties*.

BILL OF EXCEPTIONS. See *Appeal* 1; *Pleading* 1.

BILL OF PARTICULARS. See *Pleading* 4, 5.

BONDS.

1. The provision in section 57, chapter 54, Code 1891, that if a railroad corporation fail to construct its road according to its charter public subscriptions shall be void, does not make the completion of such road a condition precedent to the delivery of bonds under such subscriptions. That may, however, be made a condition precedent by the terms of the subscription. *Neale v. County Court* 90.
2. The terms and conditions as to the issuance of bonds under a public subscription to works of internal improvement contained in the proposition of subscription approved by the popular vote cannot be changed or departed from, and the issuance of bonds contrary to such terms and conditions may be enjoined by taxpayers. *Id.*
3. It is not indispensable that the elements or outlines of a sinking fund for the discharge of bonds to be issued under a public subscription to works of internal improvement shall be incorporated in the order or proposition submitting the question of subscription to popular vote. Such sinking fund should be provided after the actual incurrence of the subscription debt. *Id.* 91.
4. Public subscriptions to works of internal improvement must be paid in bonds, and such bonds cannot be issued and sold in advance of the proper time for delivery, under such subscription, and the money paid into the public treasury, to be held and afterwards paid under such subscriptions. Such issuance and sale of bonds may be enjoined. *Id.* 91.

BOOMS. See *Estopple* 4; *Nuisances*.

BURDEN OF PROOF. See *Deed* 1; *Ejectment*; *Fraud*.

BURDEN OF SHOWING RELEASE. See *Dower* 1.

CANCELLATION. See *Forged Deed*.

CANCELLATION OF LEASE. See *Oil and Gas Lease*.

CAPACITY OF GRANTOR. See *Deed* 2.

CASE. See *Possession*.

CERTIFICATE OF PUBLICATION.

Amendment of a certificate of publication of a notice may be made under leave of the court, as in the case of amendment of return of service of process. *Foley v. Rulcy*, 513.

CERTIORARI. See *Justice of the Peace* 5.

CHALLENGE TO ARRAY. See *Grand Jury* 2.

CHAMPERTY.

Where a contract is affected with *champerty*, only the party to it, and not a stranger, can make that defense against it. *Davis v. Settle*, 19.

CHANGE OF GRADE. See *Damages* 1, 2; *Municipal Corporations* 1, 3.

CIGARETTES.

1. Cigarettes manufactured in another state and imported into this State in the original package, may be sold in such original package; and the act of the legislature of West Virginia passed February 21, 1895, amending and re-enacting the Code, c. 32, s. 86, so as to provide that a certain license fee shall be paid for selling cigarettes at retail, so far as it applies to cigarettes so imported and sold by the importer in West Virginia, is not an exercise of the police power of the State, but a regulation of interstate commerce, and therefore void. *State v. Goetze* 495.
2. Where cigarettes are manufactured in a sister state, and placed in paper boxes for convenience of transportation and sale, and such boxes are provided with a proper label, giving the name of the cigarettes, the caution notice, the number of the factory, the number of the revenue district, the name of the state in which they are manufactured, and the proper internal revenue stamp duly canceled, is pasted across the end of such packages so as to seal the same, in accordance with the requirements of the act of congress and the internal revenue laws governing the packing, shipment, and sale of cigarettes, such paper box must be regarded as an original package; and its character will not be changed by its being placed, with other boxes of the same kind, in a wooden box for shipment. *Id.*

CIRCUIT COURT. See *County Boundary Disputes*.

CIRCUMSTANTIAL EVIDENCE. See *Criminal Law* 2.

CLAIM. See *Evidence* 4.

CLOUD ON TITLE.

If there is an adverse claim to a tract of land, or a considerable part thereof, evidence by recorded title papers, with possession thereunder in dispute or doubtful, such adverse claim is sufficient to throw a cloud on the title, and render the same unmarketable until such title papers are canceled. *Morrison v. Waggy*, 406.

COLLATERAL ATTACK. See *Equity Jurisdiction* 8; *Jurisdiction of Town Council*.

COLOR OF TITLE. See *Adverse Possession* 1.

COMMISSIONER IN CHANCERY.

1. Where questions of fact are submitted to a commissioner in chancery, his findings of such facts should be sustained, unless the court is satisfied from the evidence before the commissioner that such findings are erroneous, though such report is not entitled to as much weight as the verdict of a jury. *Holt v. Taylor* 153.
2. Where a master commissioner is required to state and report an account, and returns his report, to which exceptions are filed on the ground that the findings are not supported by the evidence, which exceptions are overruled, and an appeal is taken to this Court, and the testimony taken before the commissioner, together with the documentary evidence upon which said report was based, are made part of the record, this Court will look into said evidence, and, if satisfied it was insufficient to sustain the findings of the commissioner, and it appears that other testimony might have been adduced before the commissioner upon the questions submitted, will reverse the decree confirming said report with directions to recommit the account to a commissioner in order that further testimony may be taken and the findings therein corrected. *Id.*

COMMISSIONERS OF COUNTY COURT. See *Constitutional Law* 3.

COMMISSIONER'S REPORT.

When an exception to a commissioner's report is based on legal grounds, founded on the pleading and exhibits alone, such report will be taken as conclusive as to any finding that might be affected by extraneous evidence. In the absence of exception on this ground, it will be presumed that such commissioner had before him sufficient extraneous evidence to sustain his finding. *Gay v. Lockridge*, 267.

See *Equity Practice* 4.

COMMISSIONS. See *Executors* 3, 5.

COMMITTEE. See *Insane Person*.

COMMON LAW. See *Grand Jury* 2.

COMPENSATION OF PARTNER. See *Partnership* 1.

COMPETENCY. See *Witness* 1, 2, 5.

CONFLICTING EVIDENCE. See *Evidence* 10.

CONSOLIDATION OF CAUSES. See *Equity Practice* 1.

CONSTITUTIONAL LAW.

1. Section 24 of chapter 39 and section 57 of chapter 54 of the Code of 1891, in allowing subscriptions by magisterial districts in aid of railroads and other works of internal improvement, are not unconstitutional, and such subscriptions are valid. *Neale v. County Court* 90.
2. Is the statute forfeiting tracts of less than one thousand acres of land constitutional? *Parkersburg Indust. Co. v. Schultz*, 471.
3. Chapter 48, Acts 1897, allowing proceedings for removal of commissioners of the county court by proceedings in the circuit court, is constitutional. *McDonald v. Guthrie* 595.
4. Is the statute giving power to a single judge of Supreme Court to award a rule in prohibition constitutional? *Eastham v. Holt*, 600.
See *Acts of the Legislature*; *Equity Jurisdiction* 2, 3; *Supreme Court of Appeals*.

CONSTRUCTION OF LEASE. See *Mining Lease*.

CONSTRUCTION OF STATUTES. See *Town Boundaries*.

CONSTRUCTIVE TRUSTS.

1. Where a person having an inequitable paper title to a tract of land, and out of possession thereof, with full knowledge of another's superior equitable title, by any means obtains the superior legal title, which rightfully belongs to the holder of the equitable title, and Possession thereunder, so as to prevent the rightful acquirement thereof by the holder of the equitable title, and thus bars his suit at law for the possession of the land, equity will hold such person a trustee of the legal title for the benefit of such holder of the equitable title; the acquirement of the legal title under such circumstances being regarded as constructively fraudulent. *Davis v. Settle*, 17.
2. Where a holder of the equitable title to a tract of land has the right to have his deed reformed by his remote grantors, so as to cover such tract of land, and others claiming adverse inequitable title to the same land from the same grantors, with full knowledge of the outstanding equity by judicious management contrive, in fraud of the rights of the equitable holder, to perfect their inequitable title in such way as to prevent the correction of such deed in such manner by their common grantor, such others will be held as trustees of the legal title, and compelled to convey the same to the holder of the equitable title. *Id.* 18.
3. Where one party pays all or part of the purchase money for land, and title is taken in the name of another, a constructive trust, called a "resulting trust," arises in favor of the party paying as to the whole land, or *pro tanto*. *Currence v. Ward*, 368.
See *Express Trust* 1, 3.

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Hanaford 773.

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court, and, unless it is plainly apparent that such
on has been abused, this Court will not interfere
ewith. *Bank v. Hamilton* 75.

ONTINUITY. See *Adverse Possession* 2, 6.

CONTRACTS. See *Guardian and Ward* 3.

CONTRIBUTORY NEGLIGENCE. See *Instructions* 1; *Rail-
roads* 1, 2, 3.

CONVENTION OF LIENS.

Payment of some of the debts included in a decree made on a
commissioner's report convening liens under section 7, chap-
ter 139, Code 1891, in a suit by a judgment creditor for himself
and other lienors, will not suspend its execution, or call for a
rehearing or restatement of liens. *Shumate's Ex's v. Crock-
ett*, 491.

CORPORATIONS.

1. Where the name of an individual appears upon the stock
book of a corporation as a stockholder, the presumption is
that he is the owner of the stock appearing in his name; and
such book is proper evidence to go to the jury to show that he
was a subscriber to the capital stock of such corporation.
South Branch Ry. Co. v. Long's Adm'r 131.
2. Where a corporation is insolvent, and is the lessee of a coal
mine, and the said insolvent lessee is largely indebted to its
lessor for royalty reserved in the lease, which is secured by a
lien on the lease and personal property and appliances in use
about the mine by the lessee, and several of the creditors of

E. See *Adverse Possession* 1.
 INDEX.
 CHANCERY.
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CORPORATIONS—Continued.

such lessee have proceeded by way of attachment, and are proceeding, to seize and scatter the personal property belonging to said lessee, and to remove the rails from the tracks and wire ropes from the drums, a court of equity, on proper application made by such lessor, will appoint a receiver to take charge of said property. *Kanawha Coal Co. v. Ballard & Welch Coal Co.* 721.

3. A stockholder of a corporation cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant for the purpose of protecting from unfounded and illegal claims against the company his own interest and the interest of such other stockholders as choose to join him in the defense. *Id.* 722.
4. An individual stockholder is not, by reason of being a stockholder, a part owner of the property of the corporation, or entitled to act for it as its agent; but he stands as a stranger towards it, and may sue it and be sued by it and deal with it at arm's length. *Id.* 722.
5. In order to obtain the appointment of a receiver, the plaintiff must show—first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund, to which he has a right to resort for the satisfaction of his claim; and secondly, that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant. *Id.* 722.

COSTS.

Costs should usually be decreed to the party substantially prevailing. *Woods v. Stevenson*, 149.

CO-TENANCY.

1. Common seisin in fact or law, without regard to source of title, creates co-tenancy. *Davis v. Settle*, 18.
2. Where a person claiming an inferior paper title to land held by co-tenants under a superior possessory title obtains possession of the land by any device from the co-tenant in actual occupancy thereof without the knowledge of the other co-tenants, his entry will be held to have been under the co-tenancy possession, and not under his adverse paper title, and to so continue until perfect disseisin of the other co-tenants, either presumed from lapse of time or some notorious act of adversary possession, or disseisin brought home to the knowledge of the other co-tenants. The burden of establishing such perfect disseisin is on the person alleging it. *Id.*

CO-TENANCY POSSESSION. See *Co-Tenancy* 2.

COUNTY BOUNDARY DISPUTES.

The function of a circuit court, under Code 1891, c. 39, s. 18, in appointing commissioners to settle lines between counties, is ministerial, and legislative or administrative, and the court is without power to refuse such appointment on application of a county court of one of the counties. In case of its refusal, *mandamus* from this Court is the remedy, not a writ of error. This Court has no jurisdiction of such writ of error. *Summers Co. v. Monroe Co.*, 207.

COUNTY INDEBTEDNESS.

A magisterial district cannot, by subscription to works of internal improvement, become indebted up to five *per cent.* of its taxable property, and, in addition, the county up to five *per cent.* of its whole taxable property; but such district subscription, for the purposes of the limitation upon county indebtedness fixed by section 8, Article X, of the Constitution, is to be regarded as county indebtedness, and included with other county indebtedness in determining whether the total county indebtedness will exceed that limitation. *Neale v. County Court*, 90.

COURT'S AUTHORITY. See *Guardian and Ward*, 7.

CREDIBILITY OF WITNESSES. See *Criminal Law*, 3.

CREDITORS' SUITS. See *Executors* 4.

CRIMINAL LAW.

1. Case in which new trial denied. Force of verdict discussed. *State v. Bowyer* 180.
2. In a case where the evidence is entirely circumstantial, it is error in the court to instruct the jury that circumstantial evidence is often more reliable than the direct testimony of eye-witnesses, and that a verdict of guilty in such cases may rest on a surer basis than when rendered upon the testimony of eye-witnesses where memory must be relied upon, and where passions and prejudices may have influenced them, for the reason that it institutes a comparison between the two kinds of evidence mentioned, and instructs the jury as to the comparative weight of circumstantial evidence. *State v. Musgrave*, 672.
3. It is error in the court to instruct the jury that, if they were of the opinion that any witness had willfully and corruptly testified to what was false, they were at liberty to reject all of his testimony that was not corroborated by other testimony, for the reason that said instruction was calculated to mislead the jury, and was equivalent to telling them that, where a witness had sworn falsely in one thing, the remainder

CRIMINAL LAW—Continued.

of his testimony should have no weight with them unless corroborated, when they had a right to believe any portion of the testimony, whether corroborated or not, and the instruction invades the province of the jury. *Thompson's Case*, 21 W. Va. 741. *Id.*

CROSS EXAMINATION. See *Witness* 3, 4, 5.

DAMAGES.

1. The measure of damages for injury to property from change of a street grade line is that sum which will make the owner whole; that is, the diminution of the market value from the change. If the market value is as much immediately after as immediately before the change, no damages can be recovered. *Blair v. City of Charleston*, 62.
2. In estimating damages to property from change of grade in a street, all damage and injury arising from the change causing a diminution in the value of the property are to be regarded, abating all special benefits to the property enhancing its value arising from the change of grade, but not general benefits shared by the property owner in common with others in the community at large. The question is one of damage, less special, but not less general benefit. *Id.*
See *Evidence* 1; *Equity Jurisdiction* 11; *Municipal Corporations* 1, 2, 3, 4; *Nuisances; Railroads* 1, 3, 4; *Tenant for Life* 3.

DAMAGES FOR A WRONG.

The words "damages for a wrong" are, in substance, according to their legal definition, equivalent to the words, "money due on contract"; the former phrase being broader than any including the latter according to ordinary legal phraseology and meaning. *O'Connor v. Dils*, 54.

DAMAGES TO REAL ESTATE.

1. Where a lot injured by raising the grade of a street, and casting surface water thereon, as above stated, is held by M. E. as a tenant for life, and G. G. is entitled to the remainder in fee, and said M. E. and G. G. are engaged in the mercantile business as partners in a storeroom upon said lot, which storeroom is permanently injured by said surface water, said M. E. and G. G. cannot recover in the same action for damage done to the life estate, the remainder, and the joint mercantile business by raising the grade of said street and causing the surface water to flow on said lot. *Yeager v. Town*, 259.
2. Where a tort upon realty affects both the estate of a tenant for life and that of a remainder-man, each may sue separately, and, as the damages are apportionable, each recovers damages to cover the injury done to his estate. Neither can recover damages covering the entire injury to both estates. *Id.* 260.

DEATH OF EXECUTOR. See *Executors* 2.

DEATH OF PARTY. See *Witness* 5.

DEATH OF VENDOR. See *Deed* 6.

DECLARATION. See *Pleading* 2, 4, 5, 8.

DECLARATION OF PARTIES. See *Resulting Trust* 3.

DECREE.

1. There can be no decree without allegations in the pleadings to support it. *Couldale Min. & Mfg. Co. v. Clark* 85.
2. If, at the date of a decree selling property for purchase money, the title, though defective, because of prior lien or otherwise, has become clear of lien and good to the purchaser, the court may go on to decree to enforce the contract. *McLaugherty v. Croft* 271.
3. If, after an appeal to this Court has been allowed, such decree be amended on motion in the circuit court, this Court will affirm the decree as amended. *Triplett v. Lake* 428.
4. A mistake or misrecital of a sum in a decree will be corrected on motion after notice, under section 5, chapter 134, Code 1891. *Shumate's Ex'rs v. Crockett* 491.
See *Dower* 3; *Deed of Trust* 1; *Equity Practice* 4; *Fraudulent Conveyance* 1, 2; *Vendor's Lien* 4.

DECREE OF SALE. See *Administration*.

DEDICATION.

When an owner of real estate within the corporate limits of a town lays and plats the same off in town lots, streets, and alleys, and sells such lots with relation to such streets and alleys, granting to the purchasers the use of such streets and alleys, the same as though they were public streets and alleys, in all respects, and throws them open to the use of the public, he will be considered to have dedicated the same to public use, although the deeds for the lots and such streets and alleys may contain a reservation to the grantor of any damages that may be recoverable against the municipality in case the bed of such streets and alleys should be thereafter condemned for public use, as such reservation is inconsistent with and repugnant to the nature of the estate or interest granted in such streets and alleys, and tends to the destruction thereof. *Riddle v. Town of Charles Town* 796.

DEED.

1. The possession of a deed duly executed and acknowledged, with all the formalities required by law, is *prima facie* evidence of its delivery; and when a father seeks to set aside such deed to a son, on the sole ground that the son wrongfully

DEED—*Continued.*

- came into possession of it, the burden of proving such wrongful possession is upon the father. *Ward v. Ward*, 1.
2. The presumption of law is that the grantor in a deed was sane and competent at the time of its execution. *Snodgrass v. Knight*, 294.
 3. Though a deed be absolute on its face, the real nature of the transaction may be shown by parol evidence or surrounding circumstances, and the deed be held to be a mortgage. *Shank v. Groff*, 337.
 4. Where a deed absolute on its face is shown by evidence and surrounding circumstances to be a mortgage, and the grantor, in order to redeem the property, borrows the money from a third party, and the grantee in said deed, by indorsement thereon, assigns the deed to the grantor, and the grantor by like assignment, transfers the property to said third party, the deed may still be shown by evidence and the circumstances to be a mortgage to secure said third party the money advanced by him to said grantor. *Id.*
 5. What is a sufficient description of land in a deed. *Foley v. Ruley*, 513.
 6. A deed duly executed and delivered, which conveys the legal title to real estate to a vendee, although a mere power to sell, is not revoked by the death of the vendor. *McNeill v. McNeill*, 765.
 7. Stipulations, reservations, exceptions, or conditions in a deed, which are inconsistent with, and tend to deprecate or destroy, the estate or interest guaranteed, are void. *Riddle v. Town of Charles Town*, 796.
- See *Easement*, 1.

DEED OF TRUST.

1. A coal company operating mines, with assets exceeding its liabilities by at least five thousand dollars, or twenty-five *per cent.*, its assets consisting of a good plant for operating its works, with approved machinery and outfit, and a favorable contract for the sale of its whole output, and executing a deed of trust to secure the sum of six thousand dollars on its leasehold and all its property, four thousand and five hundred dollars of which is, at the time of the execution of the trust, money advanced for machinery and improving the works, and the principal part of the residue of fifteen hundred dollars being for royalty due to that date, said six thousand dollars being a part of the liabilities, it is error to decree the insolvency of the company, and to declare the deed of trust a general assignment for the benefit of all the creditors of said company. *Coaldale Min. & Mfg. Co. v. Clark*, 84.
2. A trust deed on a stock of goods for the security of creditors which provides that the trustees shall take immediate possession of such goods, and manage them for the benefit of the

DEED OF TRUST—*Continued.*

- trust, is not fraudulent *per se*, and void as to creditors, because it contains a provision allowing the grantor, without the power of sale, to replenish such stock of goods, and extending the trust to cover the same. *Baer Sons Grocer Co. v. Williams*, 323.
3. Where neither the *cestui que trust* nor trustee has notice of the fraud in fact, which would otherwise render the trust deed invalid, it will not be held fraudulent as to them. *Id.* 324.
 4. Under section 2 of chapter 74 of the Code, a deed of trust which conveys a stock of goods to a trustee, to secure a creditor to the exclusion of other creditors of an insolvent grantor is void as to the preference thereby secured, although given for the present loan of money, there being no exception in the statute as to such creditors. *Id.* 324.
 5. When a trustee under a deed of trust executed by an insolvent debtor, without notice to the vendor, takes possession of goods ordered on credit before the execution of the trust, but not shipped or received until afterwards, and sells them, and appropriates the proceeds to the use and benefit of the trust, a court of equity, at the instance of the vendor, will charge the value of such goods as a prior lien on the trust funds in the hands of such trustee. *Id.* 324.
 6. Unless otherwise stipulated, the grantor in a trust deed is entitled to the rents of the property conveyed until the trust is foreclosed by sale, or a decree is entered in a foreclosure suit sequestrating the rents. *Cox v. Horner*, 788.
See *Vendor's Lien* 3.

DEFECTIVE NOTICE. See *Depositions* 1.

DEFECTIVE TITLE. See *Decree* 2.

DEFENDANT. See *Witness* 4.

DELIVERY OF BONDS. See *Bonds* 1.

DELIVERY OF DEED. See *Deed* 1.

DEMURRER. See *Equity Pleading* 5; *Equity Practice* 3; *Pleading* 1.

DEPOSITIONS.

1. A notice to take depositions is not bad because it specifies the county in which the depositions are to be taken, or in which the suit is pending, but does not specify the State. *Davis v. Settle*, 19.
2. The deposition of a non-resident witness, taken without the affidavit required by section 34 of chapter 130 of the Code, can be read upon the trial, if it appears from the depositions themselves that the witnesses were non-residents of the State at

DEPOSITIONS—*Continued.*

the time their depositions were taken. *Hoopes v. Devaughn*, 447.

See *Return of Sheriff*.

DESCRIPTION. See *Deed* 5.

DESCRIPTION OF PREMISIS. See *Unlawful Detainer* 2, 3.

DETINUE.

A judgment in an action for the recovery of personal property before a justice, or on its appeal, or in the formal action of detinue, which is only for the sum found by the verdict as the value of the property, is erroneous. It should be for the property, if to be had, and, if not, then its value. *White v. Emblem*, 819.

See *Justice of the Peace* 10.

DEVASTAVIT. See *Executors* 1.

DEVISE TO ATTESTING WITNESS. See *Wills* 3.

DISCHARGE. See *Grand Jury* 1.

DISCHARGE OF ACCUSED.

Discharge of Accused. When he is entitled to, if not indicted, or on *nolle prosequi*. *Estham v. Holt*, 600.

DISCRETION OF COURT. See *Equity* 1.

DISMISSAL. See *Equity* 2.

DOWER.

1. Where a widow's dower is a charge on a certain tract of land, the burden is on the purchaser of the whole or a part thereof, or those claiming under him, to show that such purchase was made free and acquit from such dower. *Gay v. Lockridge*, 267.
2. Dower can only be released by wrighting under seal and acknowledged. *Jarrell v. French*, 457.
3. It is error to decree a specific sum in lieu of dower without the assent of all the parties interested. *Id.*
See *Administration*.

DRAINAGE. See *Easement*, 1, 2; *Parol License*.

DUTY OF COMMITTEE. See *Insane Person*.

EASEMENT.

1. To entitle a party wishing to drain his lot under the surface of his neighbor's lot by a right not subject to revocation at the will of such neighbor, the privilege of so doing must be acquired by deed. *Piper v. Brown*, 412.

EASEMENT—Continued.

2. The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred except by deed or conveyance in writing. *Id.*

EJECTMENT.

To defeat an action of ejectment by an outstanding title in a stranger, the defendant must show it to be a present, subsisting, operative legal title, on which the owner could recover if asserting it in an action. It is not for the plaintiff to disprove its validity. *Parkersburg Indust. Co. v. Schultz*, 471.
See *Statute of Limitations* 5.

ELECTION. See *Wills* 1.

ELECTION TO TAKE LAND.

Election to take land referred to. *Burton v. Shaffer*, 296.

ENDORSEMENT. See *Action for Use*.

ENFORCEMENT OF LIENS.

A suit to enforce liens, under section 7, chapter 139, Code 1891, by one judgment creditor, suing for himself and other lienors, will not be suspended by payment of the debt of the plaintiff after an order of reference. It may and will proceed in the name of the plaintiff, unless an order be made substituting another person as plaintiff. *Shumate's Ex'rs v. Crockett*, 491.
See *Judgment Liens* 1; 2; *Vendor's Lien* 2, 3, 4.

ENFORCEMENT OF TRUST. See *Executory Agreement*.

EQUITY.

1. A party has not an absolute right to the interference of a court of chancery to relieve him against his own act, but it is a matter of sound discretion, to be exercised by the court according to its own notion of what is reasonable and proper under all the circumstances of the particular case. *Crawford v. Ritchie*, 252.
2. It is not error to dismiss petitions, filed in chancery suits, which fail to show sufficient equitable grounds for the relief sought thereby. *Cox v. Horner*, 786.
See *Decree* 1; *Executory Agreement*; *Express Trust* 2.

EQUITY JURISDICTION.

1. Section 1, chapter 79, Code 1891 authorizes a court of equity in partition cases to pass on all question of law touching the legal title of any one claiming to share in the partition to the interest he claims, if his interest be such as, if valid, will make him a co-owner in the common subject with the plaintiff as holding under the same right or title under which the partition is to be made; but it does not authorize the court to

EQUITY JURISDICTION—*Continued.*

- pass on the title of a stranger claiming under a different title, adverse to the title under which the partition is to be made; nor can such stranger and his hostile title be brought into such suit, and the conflict between the two hostile rights settled as incident to partition. *Davis v. Settle*, 18.
2. In matters of such nature as give right to trial by jury under the Constitution, the legislature cannot give equity jurisdiction over them, and deprive the party of right of trial by jury against his protest. *Id.*
 3. Where already, at the time of the adoption of the Constitution, equity exercised jurisdiction in a certain matter, the provision of the Constitution guaranteeing trial by jury does not relate to or give right to trial by jury in suits in equity involving such matter. *Id.* 19.
 4. Equity has no jurisdiction, upon the sole ground of removal of cloud from title, to try conflicting titles to lands, at the suit of one holding either legal or equitable title, the adverse claimant being in actual possession. *Id.* 19.
 5. Where a party having the legal title to a tract of land is in possession of the same, he will be entertained in a court of equity in a suit instituted to remove a cloud from his title. *Smith v. O'Keefe*, 172.
 6. Where a portion of such tract of land is included by mistake in a survey made under the direction of the commissioner of school lands, and is sold under the statute for the benefit of the school fund, and a deed made to the purchaser thereof, equity will take jurisdiction of a suit brought by the owner of such tract of land, who is in possession of the same, for the purpose of cancelling said deed and removing the same as a cloud upon his title. *Id.*
 7. The action of a circuit court in such matters is not the exercise of chancery jurisdiction, and should not be entered in the chancery order book. *Summers Co. v. Monroe Co.*, 207.
 8. A judgment of a justice founded on a sufficient summons cannot be collaterally attacked in equity on the ground alone that the cause of action arose in another county, the place of the defendant's residence. Such question is purely legal, and does not give equity jurisdiction to review such judgment. *Newlon v. Wade*, 284.
 9. "When a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved to avoid a multiplicity of suits." *Christip v. Teter*, 356.
 10. Where there is a life tenant, and timber or other thing part of the realty going to loss, and imperative need calls for it, equity may cause it to be cut or otherwise secured for the remainder-man or reversioner. Equity has power to do so, if it do no harm to the life tenant, or he be compensated. *Williamson v. Jones*, 562.
 11. A remainder-man or reversioner has jurisdiction in equity

EQUITY JURISDICTION—Continued.

- against a tenant for life to enjoin waste, and to have compensation for the damages, the same as if he sued at law, to avoid multiplicity of suits. The same is the case between tenants in common where one is guilty of waste. *Id.* 563.
12. A court of equity will not prematurely determine to whom a sum payable in the future, the payment of which is optional with the payor, will be coming, or, in default of the payment thereof, to whom the title to real estate forfeited thereby will revert at a remote future time. *McNeill v. McNeill*, 765.
13. Equity will not enjoin municipal assessments, merely on the grounds of illegality or irregularity, when the municipality, in making such assessments, is not exceeding the constitutional or statutory limit of its authority, as the person aggrieved in such case has adequate remedy at law for his relief. *Riddle v. Town of Charles Town*, 796.
See *Forged Deed; Fraudulent Conveyance* 4; *Oil and Gas Lease*.

EQUITY PLEADING.

1. A bill *held* sufficiently definite in statement of a mistake in a deed in order to correct it. *Anderson v. Jarrett*, 246.
2. Material allegations of new matter in an answer constituting a claim for affirmative relief, not controverted by a special reply in writing, shall for the purposes of the suit be taken as true, and no proof thereof be required. Code, c. 125, s. 36. *Newton v. Wade*, 284.
3. When fraud is sufficiently alleged, with proper parties to a bill, a demurrer will not lie. *Christlip v. Teter*, 356.
4. A plea in abatement, though in a chancery suit by one judgment creditor for himself and all lienors, may be withdrawn by the defendant filing it, and another defendant can not avail himself of it nor rely on its withdrawal as error. *Foley v. Rulcy*, 513.
5. When a demurrer to a bill is overruled, a time reasonable under the circumstances of the case must be given for answer; but when a time is fixed, objection to its shortness must be made, else the point is waived. A mere order of reference, deciding nothing, may be made without such answer. *Id.*

EQUITY PRACTICE.

1. The consolidation of causes is a matter addressed to the sound discretion of the court that tries the causes. Where the parties are the same, and separate suits have been brought in equity upon matters which might have been united in one suit, and the defense is the same in all, a consolidation rule ought to be granted. *McKittrick v. McKittrick*, 117.
2. A summons commencing a suit may issue on, be returnable to, and be served on, the same first Monday in a month, if rule day. *Foley v. Rulcy*, 513.

EQUITY PRACTICE—*Continued.*

3. A general demurrer to a bill in equity is properly overruled, if the bill as a whole states facts which entitle the plaintiff to relief. *Miller v. Hall*, 647.
4. Under section 7, chapter 8, Acts 1895, if a decree is entered on a commissioner's report before the term next after the term at which the same was filed, such decree is so entered at the risk of a party excepting and showing error within the time given by statute. *Kanawha Coal Co. v. Ballard & Welch Coal Co.*, 722.

See *Deed of Trust* 5.

EQUITY OF REDEMPTION. See *Married Woman* 3.

ERRONEOUS INSTRUCTIONS. See *Instructions* 2.

ERROR. See *Dower*, 3; *Deed of Trust*, 1; *Evidence* 2, 10; *Equity Pleading* 4; *Fraudulent Conveyance* 1, 2; *Instructions* 1; *Injunction*; *Pleading* 10, 14; *Witness* 3.

ESTIMATING DAMAGES. See *Damages* 2.

ESTOPPEL.

1. A person who relies upon an adjudication as an estoppel can not dispute the truth of the material fact on which such adjudication is predicated. *Buford v. Adair*, 211.
2. A party to a suit, who claims title adverse to a former adjudication of this Court, by which he is not bound, can not rely on such adjudication as an estoppel against parties to such former suit. An estoppel, to be binding, must be mutual. *Id.*
3. If one claiming sole right to another's land spends money in improving or operating upon it, though ignorant of that other's right, the mere silence of that other will not estop him from asserting his title. He need not seek the other to tell him of his right, or speak at all, unless placed in such a situation as calls upon him to declare his right, *Williamson v. Jones*, 563.
4. H., After acquiescing and even assisting M. in maintaining a boom for the catching and preserving of ties, timber, etc., and receiving the benefits thereof in the saving of large numbers of his ties at an expense far less than it must have cost him if they had been passed beyond the boom, can not, in a court of equity, be heard to say that the boom was constructed and maintained in violation of law, and was a public nuisance, interfering with steamboat navigation, and therefore that he should not be required to pay a just and reasonable compensation for the catching and preserving of his said ties in said boom. *Miller v. Hall*, 647.

ESTOPPED BY DEED.

By deed with covenants of general warranty, an heir apparent may estop herself from afterwards claiming her inheritance. Such estoppel extends to her heirs. *Buford v. Adair*, 211.

ESTOPPEL IN PAIS.

Principles of estoppel *in pais* discussed. *Williamson v. Jones*, 562.

See *Infants*; *Married Woman* 1.

EVIDENCE.

1. Opinions of witnesses as to the value of property before and after a change in a street's grade are admissible as evidence in actions against municipal corporations for damages flowing from such change. *Blair v. City of Charleston*, 63.
2. After the cross-examination of the defendant, the only witness for the defence, the plaintiff was recalled by his counsel for the purpose of identifying and then reading in evidence two letters purporting to be written by the defendant, and which had not before been offered. On objection of defendant, this evidence was not admitted. *Held*, that the court did not err in excluding it. *McManus v. Mason*, 196.
3. When the evidence is so clearly deficient as to give no support to a verdict for plaintiff, if so rendered, the court should exclude the evidence from the jury. *Klinkler v. Wheeling S. & I. Co.*, 219.
4. Declarations of one in possession of land explanatory of such possession, as under what right or claim, are admissible to show his claim, but not to show title. *Parkersburg Indust. Co. v. Schultz*, 471.
5. The opinions of witnesses should never be received in evidence if all the facts can be ascertained and made intelligible to the jury, or if they are such as men in general are capable of comprehending and understanding. *State v. Mesgrave*, 673.
6. The general rule is that witnesses must testify to facts, and not to opinions. They must only state facts, not draw conclusions or inferences. To do so is to invade the province of the jury. *Id.*
7. Where illegal evidence is admitted against the objection of a party it will be presumed that it prejudiced such party, and, if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for the reversal of the judgment; but, if it clearly appear that it could not have changed the result if it had been excluded, it will not be cause of reversing the judgment. *Id.*
8. A party to a suit who testifies in his own behalf to a fact irrelevant to the issue in support of his own testimony, and prejudicial to his opponent, cannot object to its contradiction on the ground of irrelevancy. *Sisler v. Shaffer*, 769.
9. When illegal evidence is admitted against the objection of a

EVIDENCE—*Continued.*

party, it will be presumed that it prejudiced such party; and if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for reversal of the judgment. *Taylor v. Railroad Co.*, 33 W. Va. 40 (10 S. E. 29); *Insurance Co. v. Trear*, 29 Grat. 259. *Webb v. Big Kan. & O. R. Packet Co.*, 800.

10. When there is conflict of testimony, and evidence on one side supporting one theory, and evidence on the other side supporting another and conflicting theory, and the principles of law applicable to each theory are different, it is error for the court to give as instructions to the jury abstract propositions of law which are applicable to only one of said theories, without any reference in such instructions to the evidence in the case. *Id.*

See *Corporations*, 1; *Deed*, 3, 4; *Ejectment*; *Express Trust* 4; *Grand Jury*, 3; *Negligence*, 2; *Pleading*, 3, 12, 13; *Statute of Limitations*, 2; *Trial*.

EXCEPTIONS. See *Appeal* 2; *Commissioner's Report*.

EXCLUDING EVIDENCE FROM JURY. See *Evidence* 3.

EXECUTION.

1. Point 7 of the syllabus in the case of *Findley v. Smith*, 42 W. Va. 299, is approved. *Newlon v. Wade*, 283.
2. A levy under an execution upon property sufficient to pay the debt operates as payment, unless facts appear to deprive it of that legal effect, and *a fortiori* operates to release a surety of the principal debtor whose property was so levied. *Hoffman v. Fleming*, 762.

EXECUTORS.

1. An executor who exhausts the personal estate of his testator in paying specific legacies without taking a refunding bond, will, as to the creditors of said testator, be considered as having committed a *devastavit*, whether he had notice of the debts due such creditors at the time he paid such legacies or not. *McGlaughlin v. McGlaughlin's Legatees*, 226.
2. Where an executor has died after partially administering the estate of his decedent, and a suit is brought to recover a claim against said estate simply, no defendant is necessary, except the personal representative. *Id.*
3. An executor who has failed to comply with the requirements of section 7 of chapter 87 of the Code, so far as the same requires him to lay his account of receipts for any year within six month after its expiration, before a commissioner, shall have no compensation for his services during said year. *Id.* 227.
4. An executor can not defend himself against the suit of a creditor by showing that before he had notice of the plaintiff's

EXECUTORS—Continued.

demand he paid over the assets to the legatees of the testator, unless he took and filed a refunding bond as required by law. *Id.* 227.

5. A will devises realty to four devisees equally, vesting them with legal title, and gives the executor naked power to sell for the interest of all concerned; and by agreement among the devisees they convey to each other in severalty certain parcels at agreed valuation, on account of their interests. The executor is not entitled to commission thereon. *Buxton v. Shaffer*, 296.

EXECUTOR'S ACCOUNTS. See *Executors* 3.

EXECUTORY AGREEMENT.

Where one buys land under executory agreement, and afterwards, before legal title is passed, verbally agrees that if another will pay the purchase money he shall have the land, and that other does so, the trust is enforceable in equity. No agreement or payment, after legal title passed, will be valid without writing. *Currence v. Ward* 368.

EXPERT TESTIMONY.

1. The object of all questions to experts should be to obtain their opinion as to matters of skill or science which are in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. *State v. Musgrave*, 673.
2. Although an expert may have heard all the testimony in the case, he can not be asked to give his opinion, based merely upon his having heard such testimony in the case, whenever there is a conflict therein, unless the same is hypothetically propounded to him. *Id.*
3. An expert can not be asked to give his opinion on doubtful facts in the case on trial, which remain to be found by the jury, but a similar case may be hypothetically put to him, based upon the evidence in such case. *Id.*
4. Where the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled or scientific witnesses is not admissible. *Id.*

EXPRESS TRUST.

1. Express and constructive trusts distinguished. *Currence v. Ward*, 367.
2. Where one before a judicial sale agrees to buy in the land in his name for the benefit of the debtor, the debtor to pay the purchase money, and keep the land, this is an express trust, enforceable in equity. A second sale under decree and pur-

EXPRESS TRUST—Continued.

- chase by same purchaser will not defeat the trust. *Currence v. Ward*, 808.
3. Neither an express nor constructive trust in lands need be created, declared, or proven in writing in this State, but may be shown by oral evidence. *Id.*
 4. Testator, at the instance of his sons, M. and A., made a will devising M.'s share to A. "because my son A. has advanced to my said son M. the value of all the interest in my estate which my son M. could have but for the will, which is made in fact to enable my son M. to obtain said advance from his brother. A." In a suit by M. against A. to establish a trust in the former's favor, plaintiff testified that his interest was devised to defendant on the latter's promise to make him equal with the other children, and that said promise was not kept; while defendant swore that he purchased his brother's share outright, and paid him one thousand dollars therefor. There was evidence that before the will was made defendant advanced money to plaintiff to enable him to remove to another state, and paid some of his debts; that plaintiff returned to the State eighteen months prior to his father's death, and settled on a part of the land, and when his father died allowed his share to be partitioned to his brother, frequently declaring that it belonged to him, and for nine years after probate of the will remained on the land under sufferance of defendant, bringing suit only when the latter demanded possession. There was evidence of declarations made by defendant after testator's decease that he held the land for plaintiff, and that he afterwards agreed to convey it to him for one thousand five hundred dollars. *Held*, that a decree refusing to declare a trust should not be reversed. *Tennant v. Tennant*, 547.
- See *Resulting Trust* 3; *Trusts* 2.

EXTENSION OF TRUST. See *Deed of Trust* 2.

FELLOW SERVANTS. See *Master and Servant* 1, 2, 3, 4; *Railroads* 5.

FOREIGN RESIDENCE. See *Abandoned Wife*.

FORFEITURE. See *Constitutional Law* 2; *Title* 1.

FORGED DEED.

A suit in equity to annul a forged deed of land, and have it canceled, and the record of it declared void, brought by the legal owner of the land, who is the grantor named in the forged deed, or the party holding title from such grantor, who institutes suit to annul such forged deed while he is out of possession, is not taken out of equitable jurisdiction by the fact that the deed is void. It is not necessary, before bringing such suit, that the legal owner should establish his title and obtain possession of the land by ejectment at law. *Hoopes v. Deraughn*, 447.

FORM OF JUDGMENT. See *Res Adjudicata* 2.

FORMS OF ACTION. See *Justice of the Peace* 1.

FRAUD.

A plaintiff who alleges fraud must clearly and distinctly prove the fraud alleged in the bill. The *onus probandi* is on him, and, if the fraud is not strictly and clearly proved as it is alleged, relief can not be granted. *Armstrong v. Bailey*, 778. See *Deed of Trust* 2, 3; *Equity Pleading* 2; *Infants*.

FRAUDULENT CONVEYANCE.

1. When, in a suit to set aside a deed of conveyance as fraudulent and void as to plaintiff's debt, and to sell the real estate therefor, the court ascertains and decrees that it is so fraudulent and void, it is error not to decree further, and set aside said deed and provide for the sale of the property conveyed to pay the debt. *Christip v. Teter*, 357.
2. In any such suit it is error to decree the sale of another tract of land of the defendant for the satisfaction of said debt, the conveyance of which has not been attacked, or said tract mentioned in the pleadings, and upon which plaintiff has no lien. *Id.*
3. In such suit, where the defendant filed his answer in the nature of a cross bill, and praying affirmative relief, and the court failed to take any action thereon, or to adjudicate in the matter of said affirmative relief, in the absence of such action there is nothing of which the Appellate Court can take jurisdiction. *Id.*
4. The statute against fraudulent conveyances gives the absolute right to a creditor to a suit in equity to annul a fraudulent conveyance; and he is not compelled first to subject other property of the debtor, by execution or otherwise. *Hoffman v. Fleming*, 763.
5. Although a contract for the sale of a tract of land be made with a husband, yet it is understood between the parties at the time the contract is made that the purchase money is to be paid by the wife out of her separate estate, although the deed is made by the vendor to the husband, and a vendor's lien retained to secure the purchase money. Yet if the vendor knowingly receives the purchase money from the wife, in accordance with the original understanding, if such land is conveyed by the husband to the wife, in consideration of her payment of the purchase money, said vendor cannot attack such conveyance as fraudulent as to a debt due him from the husband as purchase money for a mule, of which the wife had no notice; neither can the assignee of such debt so attack such conveyance. *Prim v. McIntosh*, 790.
See *Promissory Note*; *Statute of Limitations* 2.

FREEHOLD ESTATE. See *Scisin*.

GENERAL BENEFITS TO PROPERTY. See *Public Improvements*.

GENERAL CREDITORS. See *Married Woman* 2, 3.

GENERAL CREDITORS' SUITS. See *Trust C editor*.

GIFTS. See *Parent and Child* 1.

GRAND JURY.

1. Grand jury. When it may be discharged. Does its improper discharge impair indictment by a subsequent jury? How many can there be at regular or adjourned term? When court may order new grand jury list. *Eastham v. Holt*, 599.
2. Grand jury. Organization of. Can circuit court test the qualifications of those on the list? Does formation or expression of opinion disqualify? Excusing them. Talesman. Must they come from the county court list exclusively? Does the statute as to selection and summoning grand jurors exclude wholly the common-law method and powers of the court? Does excusing a competent grand juror impair indictment if his place is filled by a competent one? *Id.*
3. Grand jury. Is there a right to a challenge to the array or polls, or must objection be by plea in abatement? Can accused ask a particular charge, or except to the charge? Has his counsel the right to discuss questions as to competency or organization? Has defendant the right to send witnesses to grand jury? Can grand jury hear evidence other than that of State? *Id.* 600.
4. Grand jury. Is a charge that where a homicide is proven and no circumstances of excuse appear, it is proper that the indictment should be for murder, erroneous, in not saying that the jury have power to find an indictment for manslaughter? Does it affect an indictment for murder? *Id.* 600.

GRANTOR. See *Deed of Trust* 6.

GRANTOR'S RIGHT OF REDEMPTION. See *Assignment*.

GUARDIAN AD LITEM. See *Justice of the Peace* 4.

GUARDIAN AND WARD.

1. Where a guardian, in pursuance of the request in writing of his ward, purchases for her a horse, and executes his notes as guardian for the purchase money, and she accepts and uses the horse, for several years, and finally trades it for a horse and colt, which she afterwards sells, and receives the proceeds, although the guardian, by executing such note, becomes personally liable for the purchase money, this fact

GUARDIAN AND WARD—Continued.

- does not relieve the estate of the ward from liability for said purchase money. *Wallis v. Neale*, 529.
2. If a third party pay said purchase money for said ward, and takes up said notes, and, said guardian having resigned, said third party is appointed guardian for the ward in the room and stead of said former guardian, he will be entitled to credit in the settlement of his accounts for the amounts so paid for his ward, the benefit of which was received by such ward. *Id.* 530.
 3. A guardian may lease the land of his ward, either by private contract or public outcry. *Windon v. Stewart*, 711.
 4. If a guardian lease the land of his ward in good faith for a rental believed by him to be fair, he can not be charged with a higher rental, unless it be so inadequate as to carry the conviction of bad faith. *Id.*
 5. Where a guardian or other fiduciary or trustee does an act, and it is sought to make him liable for a loss consequent thereon, on the theory that his act was injudicious and improvident, if the act was in entire good faith, and the fault only an error of judgment and want of sharp-sighted vigilance, and the act be one which, as a prudent man, he might have done in his own matters, he can not be made liable. *Id.*
 6. A guardian can not allow the tenant for repairs which the tenant should make, and get credit in his account against the ward. *Id.*
 7. A guardian can not, without a previous order of court, use any part of the principal of the ward's personal estate for any purpose, and a court can only make such order for maintenance or education, not for improvement of land or other purpose. (No opinion is intended as to a child too young to be bound out. *Id.*
 8. The only manner in which a guardian can lease or sell the land of his ward for the purpose of its development, or any other purpose, is in the manner prescribed by statute, under a decree of the court. *Wilson v. Youst*, 826.

HABEAS CORPUS.

Can the Supreme Court of Appeals admit to bail upon *Habeas Corpus*? *Ex parte Eastham*, 637.

HARMLESS ERROR.

Where a decree is plainly right, the failure of the circuit court to dispose of exceptions to incompetent testimony is not sufficient to cause the reversal thereof. *Woods v. St. venson*, 149.

HEIRS. See *Estoppel by Deed*.

HEIR APPARENT. See *Estoppel by Deed*.

HOMICIDE. See *Bail*.

HUSBAND'S DEBTS. See *Fraudulent Conveyance* 5.

HUSBAND AND WIFE.

1. A wife, or she and her husband, may maintain trespass for damages to both possession and the inheritance, where there is a conveyance of the land to a trustee to permit her to have possession and use of land, though she is vested with only equitable title. *Clay v. City of St. Albans*, 539.
2. A married woman may sue alone, or she and her husband together, at law or in equity, in any action or suit concerning her separate estate. *Id.* 540.
See *Fraudulent Conveyance* 5.

HYPOTHETICAL INSTRUCTIONS. See *Instructions* 3.

HYPOTHETICAL TESTIMONY. See *Expert Testimony* 2, 3.

IDENTITY OF NAME. See *Parties* 1.

IDENTITY OF PERSON. See *Parties* 1.

ILLEGAL EVIDENCE. See *Evidence* 7, 9.

IMPLIED LIEN. See *Vendor's Lien* 1.

IMPROVEMENTS.

One making permanent improvements on land as if his own, at a time when there was reason to believe his title good, is to be allowed their value, so far as they enhance the value of the land; but if, when making them, he has notice, actual or constructive, of the superior right of another, he can not be allowed them. *Williamson v. Jones*, 564.
See *Landlord and Tenant*.

INCLOSURE. See *Adverse Possession* 3, 4.

INCOMPETENT QUESTIONS. See *Harmless Error*.

INDICTMENT.

Does bias of the judge impair an indictment? *Eastham v. Holt*, 600.
See *Grand Jury* 4; *Intoxicating Liquors* 3.

INFANTS.

An infant of years of discretion, by intentional fraudulent conduct, will be barred, under the doctrine of estoppel *in pais*, from asserting her title to either real or personal property against one misled thereby. *Williamson v. Jones*, 563.

INJUNCTION.

Where an injunction, as awarded, is too broad, but the facts call for a more limited one, on a motion to dissolve, the injunc-

INJUNCTION—Continued.

tion should be modified, and made one warranted by the bill; and it is error to wholly overrule the motion to dissolve, and allow the excessive injunction to continue. *Neale v. County Court*, 91.

See *Bonds* 2, 4; *Equity Jurisdiction* 11, 13; *Waste* 1.

INJURIES TO REALTY. See *Tenant for Life* 3.

INJURY TO EMPLOYEE. See *Instructions* 1.

INSANE PERSON.

Under section 37, chapter 58, of the Code, it is the duty of the committee of an insane person to sue for injuries done to the real and personal estate of his ward. *Johnson v. Chapman*, 639.

INSOLVENT CORPORATIONS. See *Corporations* 2.

INSOLVENT DEBTOR. See *Deed of Trust* 5.

INSTRUCTIONS.

1. When contributory negligence is relied on in defense of an action for wrongful injury or death, a hypothetical instruction directing a finding in favor of plaintiff, which omits any reference to the facts tending to establish contributory negligence, and entirely ignores such defense, is erroneous. Nor can such error be cured by other instructions given in behalf of either party. *McAlley's Adm'r v. O. R. R. Co.*, 110.
2. Where the instructions given in behalf of plaintiff are erroneous, and contradictory to instructions given in behalf of defendant, judgment in favor of plaintiff will be reversed. *Barrett v. Boone Lumber Co.* 441.
3. Instructions must not be obscure, or vague and indefinite, or put inconsistent legal propositions, or propositions which no evidence fairly presents, or be inconsistent with others in the case, or present a certain hypothesis and make the case turn wholly on it, disregarding another hypothesis fairly arising on the evidence. *Parkersburg Indust. Co. v. Schultz*, 471.
See *Criminal Law* 2, 3; *Evidence* 10.

INTEREST. See *Vendor's Lien* 5; *Waste* 5.

INTER-STATE COMMERCE. See *Cigarettes* 1.

INTOXICATING LIQUORS.

1. In any prosecution against a druggist for selling alcohol, spirituous liquors, or wine, if the sale be proven, it shall be presumed that the sale was unlawful, in the absence of satisfactory proof to the contrary; but the presumption may be rebutted by the production of the written prescription of a

INTOXICATING LIQUORS.—*Continued.*

- practicing physician in good standing in his profession, and not of intemperate habits, complying with the requirements of section 6 of chapter 32 of the Code. *State v. Bluefield Drug Co.*, 144.
2. A case in which the prescription relied on by the defendant to rebut the presumption that such sale was unlawful is considered as complying with the requirement of the statute, and, under the circumstances of the case, constituting a defense to the indictment. *Id.* 145.
 3. Indictment against physician for issuing prescription under sections 6 and 7, chapter 32, of the Code, to aid druggists in violation of provisions of said chapter, held sufficient. *State v. Watts*, 182.

ISSUANCE OF BONDS. See *Bonds* 2, 4.

JOINDER OF PARTIES. See *Damages to Real Estate* 1.

JOINT ACTIONS. See *Actions* 2.

JOINT PRINCIPALS. See *Suretyship*.

JOINT TORT FEASORS. See *Actions* 2.

JOURNAL. See *Acts of the Legislature*.

JUDGE.

Will keeping a grand jury in custody of sheriff, or refusing to bail, or refusing to sign exceptions as to formation of grand jury, show such abuse of power by judge as to impair indictment? *Eastham v. Holt*, 600.

JUDGMENT. See *Detinue; Justice of the Peace* 10; *Partnership* 2; *Pleading* 6.

JUDGMENT CREDITOR. See *Statute of Limitations* 4.

JUDGMENT LIENS.

1. A judgment debtor's real estate cannot be decreed for sale to pay the judgment liens thereon until such real estate has been properly ascertained, and it appears to the court that the rents and profits thereof will not satisfy such liens within five years. *Newton v. Wade*, 284.
2. When a suit under section 7, chapter 139, Code 1891, has been begun by one judgment creditor for himself and all other lienors to enforce the lien of a judgment on land, no other lien holder can sue for the same purpose. If he does, the pendency of the first suit may be pleaded in bar and dismissal of the second suit. *Foley v. Ruley*, 513.

JUDGMENT OF JUSTICE. See *Equity Jurisdiction* 8.

JUDICIAL SALE.

A purchaser at a judicial sale is conclusively held as having notice of all the facts touching the rights of others in the property sold, disclosed by the record of the case. *Williamson v. Jones*, 563.

See *Express Trust* 2.

JURISDICTION. See *Fraudulent Conveyance*.

JURISDICTION OF LOWER COURT. See *Prohibition* 1, 2.

JURISDICTION OF TOWN COUNCIL.

In the case of an inferior court, board, or body, required to keep a record, the facts essential to give it jurisdiction must appear in its proceedings, else its action will be void and open to attack collaterally; but, if its record state such facts, its jurisdiction will not be open to attack, nor can such facts be disproven in a collateral proceeding, nor will any error appearing therein affect its action. *Shank v. Town*, 243.

JURY. See *Special Issues*.

JUSTICE OF THE PEACE.

1. Common-law forms of actions, in so far as justices' trials are concerned, are entirely abolished by section 49, chapter 50, Code. *O'Connor v. Dils*, 54.
2. The provisions of chapter 50 of Code were not intended to keep up the distinction between the actions *ex contractu* and *ex delicto* as at the common-law. *Id.*
3. In an action before a justice of the peace, the defendant, not having entered a special appearance before the justice for the purpose only (and so stating in submitting his motion) of quashing the writ or return, cannot, on appeal to the circuit court, take advantage of any defect in the writ or return, either by motion to quash, or by a plea in abatement. *Blankenship v. K. & M. Ry. Co.* 135.
4. A summons sued out in the name of J. W. B., guardian *ad litem* of W. B., a minor, before a justice, although not in the best form, yet, aided by the provision in section 26 of chapter 50 of the Code, in relation to proceedings before justices, that no summons shall be quashed or set aside for any defect therein if it be sufficient on its face to show what is intended thereby, is held sufficient, the defendant not being misled by it. *Id.*
5. Where a justice renders judgment on a verdict on one day, and the next day a motion for a new trial is made and overruled, the ten-days allowed for a *certiorari* begins to run on the latter day. *Straley v. Payne* 185.
6. A motion for a new trial suspends the finality of judgment already entered, until the date of the denial of the new trial, for the purposes or limitation of writ of error. *Id.*

JUSTICE OF THE PEACE.—*Continued.*

7. Where a summons before a justice demands judgment for a fixed sum for money due on a contract, and a jury, demanded by defendant, is sworn to try all matters of difference between the plaintiff and defendant, and a true verdict given according to the evidence, the verdict will not be set aside only because after such oath, and before evidence given, the plaintiff states his cause of action. The oath relates to all matters of fact involved in the case, though the complaint was stated or filed after the oath. *Id.* 186.
8. By section 180, chapter 50, Code, all formalities in the entries of a justice's judgment are dispensed with, and the same is sufficient if the truth be stated so as to be intelligible. *Davis v. Tump* 191.
9. A misnomer in a justice's summons is amendable, and is waived and cured by appearance and plea to the action. *Weimer v. Rector* 735.
10. A verdict in an action for the recovery of personal property before a justice or on its appeal must find the value of the property, and of each article sued for, as in the action of detainue, and the judgment must do so. *White v. Emblem* 819. See *Unlawful Detainer*.

JUSTICE'S COURT. See *Arbitration*.

JUSTICE'S DOCKET. See *Justice of the Peace* 8.

KNOWLEDGE OF PARTIES. See *Decd of Trust* 3.

LACHES. See *Resulting Trust* 1; *Statute of Limitations* 1.

LANDLORD AND TENANT.

A tenant can not make permanent improvements, and charge the landlord therefor, without the latter's consent. *Windon v. Stewart*, 711.

LEASE. See *Guardian and Ward* 8; *Oil* 3; *Tenant for Life* 4; *Tenants*.

LEGACIES. See *Executors* 1; *Wills* 2.

LEGISLATURE.

If the original title of a bill is sufficient, the legislature does not vitiate the legislation by rendering such title more definite and specific during the progress of enactment, if the object of the bill is not thereby essentially changed. *Priec v. City of Moundsville*, 523.

LETTERS AS EVIDENCE. See *Evidence* 2.

LEVY. See *Execution* 2.

LIABILITY OF GUARDIAN. See *Guardian and Ward* 1, 4, 5.

LIABILITY OF TENANTS. See *Tenants; Waste* 3.

LIABILITY OF TRUSTEE. See *Decd of Trust* 5.

LICENSE. See *Cigarettes* 1.

LIMITATION OF APPEAL. See *Appeal* 3.

LIVE STOCK. See *Railroads* 4.

LIVING DEBTOR. See *Statute of Limitations* 4.

MAGISTERIAL DISTRICTS. See *Constitutional Law* 1; *County Indebtedness; Tax Levies*.

MAINTENANCE. See *Parent and Child* 3.

MAINTENANCE OF ACTION. See *Husband and Wife* 2.

MANDAMUS. See *County Boundary Disputes*.

MANSLAUGHTER. See *Grand Jury* 4.

MARKETABLE TITLE.

A marketable title is one that is free from reasonable objection to a reasonable purchaser. *Morrison v. Waggy* 405.

MARRIED WOMAN.

1. A married woman can not, by even fraudulent conduct be barred under the principle of estoppel *in pais* from asserting her title to land, though separate estate; but as to her personal estate it is different. Now that she is enabled to contract as if single, she will be bound by estoppel *in pais* touching her contracts as if single. *Williamson v. Jones* 563.
2. The general creditors of a married woman can only subject the rents of her real estate to the payment of her debts so long as she is legally entitled to the same. *Cox v. Horner* 786.
3. A married woman who has conveyed her real estate to a trustee to secure a debt fully equal to, or largely in excess of its value, may surrender her valueless equity of redemption to the trust creditor, to avoid expense of a sale or the cost of a suit, without detriment to her general creditors. *Id.* See *Trust Creditor*.

MASTER AND SERVANT.

1. The test whether a master is liable to one servant for the negligence of another servant is the character of a negligent act. If it be in the doing of an act incumbent on the master as a duty of the master to the servant, the master is liable; otherwise not. *Jackson v. N. & W. R. Co.*, 380.
2. A master's liability to one servant for the negligence of an-

MASTER AND SERVANT. — Continued.

- other is not dependent on the grade of the servants, nor on the fact that one has authority over the other, but on the character of the negligent act. *Id.*
3. All servants engaged in the common service of the same master in conducting and carrying on the same general business, in which the usual instrumentalities are employed, are fellow servants. A proper test of this rule is whether the negligence of the one is likely to occur and inflict injury on the other. *Id.*
 4. If a vice principal, in the particular act in which his negligence occurs, is not in the line of his duty, but performing an act in the line of one who would be a fellow servant with the injured servant, the master is not liable for the negligence of the vice principal, as he is, as to this act, a fellow servant with the injured one. *Id.*

MASTER'S LIABILITY. See *Master and Servant* 1, 2, 4.

MEASURE OF DAMAGES. See *Damages* 1.

MEASURE OF RELIEF. See *Settlements*.

MERCHANDISE. See *Deed of Trust* 2, 4.

MINES. See *Tenant for Life* 1.

MINING LEASE.

T. leases from C. and others a tract of land for the purpose of mining and shipping coal therefrom, and assigns the lease to the C. M. & M. Co.. The lease provides a royalty or rental to the lessors of ten cents for every ton of two thousand pounds of coal which should pass over the screen mentioned in the lease, and five cents per ton for every ton which passed through the screen, and which should be shipped from the demised premises; and it further provides that the lessee should pay to the lessors the sum of three thousand dollars annually as a minimum rental thereunder, whether the quantity of coal produced that amount of rental or not. A distress warrant being sworn out, then a receiver appointed, the works were closed, with five months rental unpaid, for which time the royalty on the coal actual mined amounted to one hundred dollars per month, making in all five hundred dollars, which amount was decreed to the lessors. *Held*, that the true amount due the lessors was five-twelfths of three thousand dollars, or one thousand two and fifty dollars, which should have been decreed to them for unpaid royalty. *Cooldale Min. & Mfg. Co. v. Clark*, 84.

MINISTERIAL DUTIES. See *County Boundary Disputes*.

MISNOMER. See *Justice of the Peace* 9.

MONEY DUE ON CONTRACT. See *Damages for a Wrong*.

MORTGAGE. See *Deed* 3, 4.

MOTION. See *Decree* 4.

MOTION FOR CONTINUANCE. See *Continuance*.

MUNICIPAL CORPORATIONS.

1. If a street be opened and used upon the natural surface as a grade line, and it is recognized and treated by a city or town as a public street, and owners of lots upon it build with reference to such natural grade line, and it is changed, the city or town is liable to lot owners for damages consequential upon the change of grade, though no grade for the street was ever adopted by the municipality, under section 9, article III of the Constitution. Such natural grade thus became the established grade. *Blair v. City of Charleston* 62.
2. Though such owner purchase after the municipality has established a paper grade line, but before actual physical grading conforming a street to that line, that will not preclude his recovery for damages to his lot; but he cannot recover for damages to buildings erected after the adoption of such paper grade. He must conform to such grade line. *Id.*
3. Where a town, in grading its streets, raises the grade so as to cast the surface water on an adjoining lot occupied by a store-room, if the grade of such street is not raised in violation of the Constitution, or some statute law, or the charter of the town, no action can be maintained by the adjoining lot owner for damages sustained by reason of casting said surface water on said adjoining lot, unless the surface water is collected in a body and cast upon said lot. *Yeager v. Town* 259.
4. If a city or town, by gutters, drains, or otherwise, collect surface water and cast it in a body on land, it is liable in damages. *Clay v. City of St. Albans* 540.
5. If a city or town negligently fails to keep its existing drains and gutters open and clear of obstructions, and in condition to carry off the water in them, and by reason thereof land is injured from their overflow, the city or town is liable in damages provided the overflow is not due to an unusual or extraordinary storm or rainfall. *Id.*

MURDER. See *Grand Jury* 4.

NEGLIGENCE.

1. When a given state of facts is such that reasonable men may differ upon the question whether there was negligence or not, the determination of the matter is for the jury. But when the facts are such that all reasonable men must draw from them the same conclusion,—when there is no room for two

NEGLIGENCE.—*Continued.*

reasonable opinions about it,—then it becomes a question of law for the court. *Klinkler v. Wheeling S. & I. Co.*, 219.

2. There must be reasonable evidence of negligence. But where a thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *Snyder v. Wheeling Electrical Co.*, 662.

See *Master and Servant* 3, 4; *Pleading* 12, 13; *Railroads* 4.

NEGOTIABLE NOTE.

The possession of a bill or note which is payable to bearer or indorsed in blank is *prima facie* evidence of ownership, and also that the holder received it upon a valuable consideration, paid therefor in the usual course of trade or business. *Bank v. Simmons* 79.

See *Action for Use*.

NEW LIST. See *Grand Jury* 1.

NEW MATTER. See *Equity Pleading* 2.

NEW TRIAL.

During the term of court, the counsel representing the parties plaintiff and defendant in a case, in the presence of the regular judge, are talking over the business remaining unfinished, the defendant in said case being present, who understands from the conversation that his case should not be taken up before the next Tuesday for trial, which conversation was on Friday; and under this impression the defendant, with his witnesses, left the court. On Saturday a special judge was elected, who went upon the bench on Monday morning, and tried the case, in the absence of said defendant and his witnesses, and in ignorance of said misunderstanding, although an attorney for the defendant was in town, and had notice that a jury was being called in the case, and refused to go to the court house, on account of some feeling existing between himself and the special judge, and on account of his being too unwell to attend to business, and sent another attorney to state the matters to the court in reference to said misunderstanding. The trial is proceeded with and a judgment is rendered against the defendant, although he claims to have had a good defense. The trial of the cause, under the circumstances, works such a surprise upon the defendant that a motion to vacate the judgment, set aside the verdict, and award a new trial should have prevailed. *Simpkins v. White* 200.

See *Contempt* 2; *Criminal Law* 1; *Justice of the Peace* 5, 6; *Parties* 2.

NEWLY-DISCOVERED EVIDENCE.

1. Whether either party may introduce newly-discovered testimony after a case has been once closed is a matter of sound discretion, which will not be reviewed, unless it has been clearly abused. *Sisler v. Shaffer*, 769.
2. Newly-discovered evidence, merely cumulative, however apparently decisive, is not sufficient cause to justify setting aside the verdict of a jury. *Id.*

NOLLE PROSEQUI. See *Discharge of Accused*.

NON-ASSUMPSIT. See *Pleading* 10.

NON-NEGOTIABLE NOTES.

The assignee of a non-negotiable note or obligation can take no rights which his assignor did not possess, and generally make no defenses he could not make. *Prim v. McIntosh*, 790.

NON-RESIDENT WITNESS. See *Depositions* 2.

NOTICE. See *Depositions* 1; *Judicial Sale*; *Purchase Pendente Lite*.

NUISANCES.

If a boom is erected and maintained on a navigable stream in violation of law, and is therefore a public nuisance, an individual has no cause of complaint aside from that of the common public, unless he suffer a special and peculiar damage therefrom, distinct and apart from the common injury. *Miller v. Hall*, 647.

See *Estoppel* 4.

OATH OF JURY. See *Justice of the Peace* 7.

OBJECT OF ACT. See *Legislature*.

OFFICIAL ACT. See *Contempt* 3.

OIL.

1. Under the circumstances, a party taking petroleum oil unlawfully is allowed all costs of production, including costs of boring productive wells, as a set-off against rents and profits. *Williamson v. Jones*, 564.
2. Petroleum oil, as it is found in the cavities of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word "land." *Wilson v. Youst*, 826.
3. An oil lease, investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain *per cent.* thereof, is, in legal effect, a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises. *Id.*
See *Tenant for Life* 4; *Waste* 1, 4.

OIL AND GAS LEASE.

Where a lease is made on the 12th day of April, 1889, "for the sole and only purpose of drilling and operating for petroleum oil and gas for the term of twenty years, or as long thereafter as oil or gas is found in paying quantities," and providing that the lessee shall commence one well on or before the 10th day of May, 1889, and prosecute the same to completion, unavoidable accidents excepted, and on the 26th day of October, 1889, the time is extended for such commencement of work by written endorsement on the lease to the 28th day of November, 1889, and nothing is done under said lease for the period of seven years from said last-named date, the lessee is presumed to have abandoned the said lease, and a court of equity may entertain a suit to cancel the lease and quiet title. *Crawford v. Ritchie*, 252.

OIL WELLS. See *Tenant for Life* 1.

OPINION EVIDENCE. See *Evidence* 1, 5, 6.

OPTION. See *Vendor and Vendee*.

ORDER.

An unconditional verbal promise to pay a written order is an acceptance of such order, and, if founded on a sufficient legal consideration, is binding on the acceptor. The debt, default, or misdoing of another is not a sufficient consideration to exempt such promise from the operation of the statute of frauds. *Barrett v. Boone Lumber Co.*, 441.

ORDER OF REFERENCE. See *Equity Pleading* 5.

ORDER OF SUBMISSION. See *Arbitration*.

ORIGINAL PACKAGE. See *Cigarettes* 1, 2.

OWNERSHIP. See *Negotiable Note*; *Tenant for Life* 2.

PAPER GRADE LINE. See *Municipal Corporations* 2.

PARENT AND CHILD.

1. The object of section 1 of chapter 71 of the Code, is not to prevent a minor from holding such personal property as his father may deem proper to donate to him or allow him to hold, when not in fraud of the rights of others. *Blankenship v. K. & M. Ry Co.*, 135.
2. W., nineteen years of age, employed away from home, took a horse for his wages, and took it home to his father's, with whom he was living; and the father not only never claimed the horse, but recognized the son's right and title to it, and, two months after the son got the horse, the father traded him a mule for the horse; the father testifying that the horse was

PARENT AND CHILD.—*Continued.*

the property of the son, and that the father was not in debt, and was not sheltering the mule in his son's name, to escape payment of debt. *Held*, that the mule was the property of W., the son. *Id.*

3. A father, if of ability, must support his child, and can not charge him with maintenance, though the child have estate of his own. *Windon v. Stewart*, 711.

PAROL AGREEMENT. See *Executory Agreement*.

PAROL CONTRACT. See *Specific Performance* 1, 2.

PAROL EVIDENCE. See *Express Trust* 3; *Trusts* 3.

PAROL LICENSE.

A parol license from one lot owner in a town to another to pass a tile drain under the former's lot for the purpose of draining the lot of the latter is revocable at the pleasure of such licensor. *Pifer v. Brown*, 412.

PARTIAL INCLOSURE. See *Adverse Possession* 4.

PARTIES.

1. The identity of name of a plaintiff and a defendant, in the absence of proof to the contrary, is presumption of identity of person. *Succelland v. Porter*, 189.
2. There is no right in citizens and taxpayers not parties to a suit to petition for a new trial or other action therein. There is no right to petition a court "for redress of grievances" by strangers to the case. That right is applicable only to political bodies. *State v. Hansford*, 773.
See *Actions* 1; *Enforcement of Liens*; *Executors* 2; *Equity Practice* 1; *Purchase Pendente Lite*; *Suits to Sell Realty*; *Suit to Cancel Option*; *Vendors Lien* 4.

PARTITION. See *Equity Jurisdiction* 1.

PARTNERSHIP.

1. One partner is not entitled to compensation for his services in the common business, though they may exceed those of his co-partner, in the absence of a special agreement. *Taylor v. Dorr*, 351.
2. A judgment against the individual members of a firm on a firm liability is not erroneous for failure to set out the firm name. *Weimer v. Retor*, 735.

PARTY TO SUIT. See *Evidence* 8.

PAYMENTS. See *Convention of Liens*; *Enforcement of Liens*; *Equity Jurisdiction* 12.

PERSONAL ESTATE. See *Married Woman* 1; *Parent and Child* 1, 2; *Tenant for Life* 2; *Trusts* 1.

PETITION. See *Contempt* 2; *Parties* 2.

PLEA. See *Appeal* 2.

PLEADING.

1. Where there is a demurrer to the evidence, the evidence given in the cause on both sides is stated in the demurrer, and not set forth in a bill of exceptions. *Berkeley v. Chesapeake & Ohio R'y Co.*, 12.
2. In such case the declaration need not notice the suretyship, because immaterial. *Riley v. Jarvis*, 48.
3. *Allegata* and *probata* must correspond. Where there is no count in a declaration on the cause of action shown by the evidence, it is a variance, and there can be no recovery. *Id.*
4. A bill of particulars filed with a declaration in an action of *assumpsit*, under section 11, chapter 125, Code, is no part of the declaration, and there can be no plea to it. *Id.*
5. If there be no count in the declaration based on the claim specified in such bill of particulars, the items it contains cannot be proven, and no recovery can be had therefor. *Id.*
6. A plea of *res judicata* must show that the former judgment was on the merits. *Id.*
7. A plea of such submission to arbitration, filed in a subsequent action in a circuit court on the same cause of action, must be in abatement, not in bar, and comes too late after pleas in bar have been filed. *Id.*, 44.
8. Where there is more than one count in a declaration, and a demurrer is sustained and judgment for defendant as to some of them, and overruled as to others, the judgment upon the counts held bad is not such final judgment as to give a writ of error until the case ends as to the remaining counts. *Id.*, 44.
9. Matters not set up in the pleadings can not be considered. *Snodgrass v. Knight*, 294.
10. While a special plea, setting forth matters in discharge of the action, may be filed when the plea of *non-assumpsit* has been filed, yet, when the matters set up in said plea may be given in evidence under the general issue, it is not error to reject such plea. *Dillon Beebe's Son v. Eikle*, 502.
11. Pleading must show title. This rule is met, in declarations in trespass or case for injury to property, real or personal, by alleging a possession as indicated below, without stating the plaintiff's estate. *Clay v. City of St. Albans*, 539.
12. A declaration for tort arising from negligence may allege the mere negligence generally, without stating the particular facts going to prove negligence, but must specify with reasonable certainty the main or primary act of omission or commission doing the damage; and the allegation that the defendant

PLEADING—Continued.

did the particular act causing the damage furnishes the predicate or basis for evidence of all such incidental facts and circumstances of omission and commission as fairly tend to establish the negligence of the primary act, and to plead them specially would be to plead mere evidence instead of facts. *Snyder v. Wheeling Electrical Co.*, 661.

13. Where a declaration based on negligence states a particular act as the cause of the damage, no evidence of other acts causing it can be given. *Id.*, 662.
14. It is not reversible error that there was no plea or issue in an action before a justice, either in the justice's court or on appeal, where there was a full trial as if on plea and issue. *White v. Emblem*, 819.
See *Decree 1; Res Adjudicata 1; Unlawful Detainer 4.*

PLEAS IN ABATEMENT. See *Equity Pleading 4; Pleading 7.*

PLEAS IN BAR. See *Pleading 7.*

POSSESSION.

Actual possession of land will sustain trespass or case against any but the true owner entitled to possession, or one acting under him. *Clay v. City of St. Albans*, 539.
See *Equity Jurisdiction 4, 5, 6; Pleading 11; Specific Performance 1, 2.*

POWER TO PUNISH. See *Contempt 1.*

PRACTICE IN TRIAL COURTS. See *Trial.*

PREFERRED CREDITORS. See *Deed of Trust 4.*

PRESBYTERIAN CHURCH. See *Wills 5.*

PRESCRIPTION OF PHYSICIAN. See *Intoxicating Liquors 1, 2, 3.*

PRESUMPTION OF LAW. See *Deed 2.*

PRIOR LIENS. See *Decree 2; Vendor's Lien 2, 3.*

PROCEEDURE FOR CONTEMPT. See *Contempt 4.*

PROCESS. See *Justice of the Peace 3.*

PROHIBITION.

1. Does prohibition lie merely because the jurisdiction of the lower court depends on the question whether a statute giving it jurisdiction is constitutional? *Per BRANNON, JUDGE*, it does not lie. *McDonald v. Guthrie*, 595.
2. Prohibition. When it lies for abuse of power when court has jurisdiction. *Eastham v. Holt*, 599.
See *Constitutional Law 4.*

PROMISSORY NOTE.

The assignment of a promissory note carries with it all the remedies of the assignor, including the right to attack a fraudulent conveyance, but this must be construed to mean to successfully attack such conveyance. *Prim v. McIntosh* 790.

PROVINCE OF JURY. See *Evidence* 6.

PUBLIC IMPROVEMENTS.

What are special benefits? If property is enhanced in value by reason of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to greater or less extent, be likewise specially benefitted. In other words, it is not only such benefits as are special, or limited to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value—that is, specially benefited—that are to be considered. If a piece of property is enhanced in value, its enhancement, or in other words, benefits to the property, cannot be said to be common to any other piece of property specially enhanced in value, and it is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. *Blair v. City of Charleston*, 62.

PURCHASER. See *Judicial Sale*.

PURCHASE FOR WARD. See *Guardian and Ward* 1.

PURCHASE PENDENTE LITE.

Pendente Lite purchasers need not be made parties. Where judgments are docketed or deed of trust recorded, or liens otherwise acquired, and a chancery suit to enforce same is pending, there need be no notice of the pendency of such chancery suit, under section 13, chapter 139, Code 1891, to bind purchasers purchasing after the docketing of such judgment or recordation of such deeds of trust or lien. They are *pendente lite* purchasers, under the common-law rule. *Shumate's Ex'rs v. Crockett*, 491.

QUESTION FOR COURT. See *Negligence* 1; *Res Adjudicata* 1.

QUIETING TITLE. See *Constructive Trusts* 2; *Equity Jurisdiction* 1, 4, 5, 6; *Suit to Cancel Option*.

RAILROADS.

1. Where a party with no defect in his sight or hearing attempts to cross a railroad track at a street crossing in a city, without

RAILROADS.—Continued.

looking or listening for the approach of a train, and is struck and injured by a train moving on said railroad, his negligence is such as to preclude him from recovering damages for such injury, although the servants of the railroad may have been negligent in failing to ring a bell or blow a whistle before reaching said crossing, as required by statute. *Berkeley v. Chesapeake & O. Ry. Co.*, 11.

2. The person thus attempting to cross the railroad track, and the company owning the railroad, have mutual and reciprocal duties and obligations in such case; and, though a train has the right of way, the same degree of care and diligence to avoid collision is due from both. *Id.*
3. It is the duty of the pedestrian at the street crossing of a railway to look carefully for an approaching train and, if the view is obstructed, to listen before attempting to cross the track; otherwise, he will himself be guilty of negligence, which will prevent his recovery for an injury received in crossing. *Id.*
4. On a light, moonlight night, a passenger train of cars was coming at usual rate of speed on a clear, straight track, where a mule upon the track could be seen two hundred and fifty yards or more. A mule goes up a fill to the railroad track far enough in front of the engine to walk along the track in the direction the train was going, some forty feet before the engine overtook and killed it, the engineer failing to ring the bell or blow the whistle, or to do anything to prevent the accident, if possible. *Held*, to be evidence tending to prove negligence on the part of the defendant, and, in the absence of any rebutting evidence, is deemed sufficient to support a verdict for the plaintiff. *Blankenship v. K. & M. Ry. Co.* 135.
5. A conductor is a fellow servant with a brakeman and other servants on a train, not a vice principal. *Jackson v. N. & W. R. Co.*, 380.

RAILROAD AID. See *Bonds* 1, 2, 3, 4; *Constitutional Law* 1; *County Indebtedness*; *Tax Levies*.

RAILROAD CROSSINGS. See *Railroads* 1, 2, 3.

REAL ESTATE. See *Judgment Licns*; *Oil* 2; *Specific Performance* 2; *Trusts* 1; *Wills* 2.

RECEIVER. See *Corporations* 2, 5.

RECORD. See *Appeal* 1; *Jurisdiction of Town Council*.

RECORDED TITLE. See *Cloud on Title*.

RECOVERY OF MONEY. See *Statutory Actions*.

RECOUPMENT OF DAMAGES. See *Assumpsit*.

REFERENCE.

The circuit court may state an account in a chancery cause without an order of reference to a commissioner, if there is sufficient data and evidence in the cause to enable it to properly do so. *Darby v. Gilligan*, 755.

See *Vendor's Lien* 8.

REFORMATION OF DEED. See *Equity Pleading* 1.

REFUNDING BOND. See *Executors* 1, 4.

RELEASE OF DOWER. See *Dower* 1, 2.

RELEASE OF SURETY. See *Execution* 2.

RELEVANCY. See *Evidence* 8.

REMAND FOR WANT OF PARTIES.

When a chancery cause is remanded from this Court to the circuit court for the want of necessary and proper parties, and after the cause is again docketed in the circuit court such necessary and proper parties appear, and file answers to the plaintiff's bill, it is not necessary to send the case to rules for that purpose. *Darby v. Gilligan*, 755.

REMAINDER-MAN. See *Damages to Real Estate* 1, 2; *Tenant for Life* 4; *Waste* 2.

REMEDY AT LAW. See *Equity Jurisdiction* 13.

REMOVAL OF COUNTY OFFICERS. See *Constitutional Law* 3.

RENTS AND PROFITS. See *Deed of Trust* 6; *Married Woman* 2; *Oil* 1.

REPAIRS. See *Guardian and Ward* 6; *Tenants*.

REPORT OF COMMISSIONER. See *Commissioner in Chancery* 1, 2.

RES ADJUDICATA.

1. A plea of former judgment on the same cause of action in bar of the plaintiff's suit, replied to by 'No such judgment,' should be tried by the court by an examination and inspection of the record, and it is improper to submit the same to a jury. *Davis v. Trump*, 191.
2. Where the plaintiff already has an intelligible judgment, though defective in form and grammar, against the same parties on the same cause of action, he is precluded thereby from instituting another suit therefor before another justice, or in court. *Id.*

See *Estoppel* 1, 2; *Pleading* 6.

RECISSION OF CONTRACT. See *Vendor and Vendee*.

RESERVATIONS IN DEEDS. See *Dedication; Deed 7*.

RESIGNATION OF GUARDIAN. See *Guardian and Ward 2*.

RESTATEMENT OF LIENS. See *Convention of Liens*.

RESULTING TRUST.

1. Where a period of forty years has been allowed to elapse since an alleged resulting trust was created, and the plaintiffs and those under whom they claim have not had that actual, notorious, and exclusive possession which would entitle them to specific performance, a court of equity will refuse relief as against one who denies such resulting trust, and relies on the bar of *laches*. *Woods v. Stevenson*, 149.
2. Where one pays part of the purchase price of land, and a deed is taken in another's name, so that a resulting trust arises, so it is certain what amount the one claiming under the trust paid, whether the part paid be an exact divisor of the whole or not—that is, whether it be an aliquot part or not—is immaterial, this will be a trust *pro tanto*. There must be certainty as to the interest in the land. *Currence v. Ward*, 368.
3. A resulting trust being a mere creature of equity, it cannot therefore arise where there is an express trust declared by the parties, and evidenced by a written declaration of such express trust. *Coleman v. Parran*, 737.
See *Constructive Trusts*. 3.

RETURN OF EXECUTION. See *Execution 1*.

RETURN OF SHERIFF.

If a sheriff has made a return upon a notice to take depositions which, through inadvertence or mistake, is not in accordance with the facts, the court will be liberal in allowing him to amend his return, and when amended it will relate back to the date of the original return. *Hoopes v. Deraughn*, 447.

REVERSAL.

1. "Where a decree sought to be reversed is based upon depositions which are so conflicting, and of such a doubtful and unsatisfactory character, that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusion to be deduced therefrom, the Appellate Court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the Appellate Court might have pronounced a different decree if it had acted upon the cause in the first instance." *Christip v. Teter*, 356.
2. Point 1 of syllabus, *Smith v. Yoke*, 27 W. Va. 639, Approved. *Jarrell v. French*, 456.
See *Evidence 7, 9; Harmless Error; Instructions 2*.

REVERSION. See *Equity Jurisdiction* 12.

REVERSIONER. See *Equity Jurisdiction* 10.

REVIEW OF REPORT. See *Commissioner in Chancery* 2.

REVIEW ON APPEAL.

The weight of the evidence is for the jury, and, unless it plainly preponderates against the verdict, it will not be disturbed. *Scott v. Chesapeake & O. R. Co.*, 484.

See *Appeal* 4; *Newly Discovered Evidence* 1; *Reversal* 1, 2; *Supreme Court of Appeals*.

REVOCABILITY OF LICENSE. See *Parol License*.

REVOCATION. See *Deed* 6.

ROYALTY. See *Mining Lease*.

RULE. See *Contempt* 4.

SALE. See *Guardian and Ward* 8; *Oil* 3; *Tenant for Life* 4.

SALES BY DRUGGISTS. See *Intoxicating Liquors* 1.

SALT WELLS. See *Tenant for Life* 1.

SEISIN.

The word "seisin" imports a freehold estate, either for life or in fee. *Clay v. City of St. Albans*, 539; See *Co.-Tenancy* 1.

SEPARATE ACTIONS. See *Damages to Real Estate* 2.

SEPARATE ESTATE. See *Abandoned Wife*.

SET-OFF. See *Oil* 1.

SETTING ASIDE VERDICT. See *Newly Discovered Evidence* 2.

SETTLEMENTS.

Where a former settlement is surcharged and falsified, no new settlement covering and overhauling the whole transaction is to be made, but an account is made of items surcharged or falsified, and the sum of such items is the measure of relief to the party injured by the former settlement. *Windon v. Stewart*, 712.

See *Guardian and Ward* 2.

SINKING FUND. See *Bonds* 3.

SOUND DISCRETION. See *Continuance*.

SPECIAL AGREEMENT. See *Partnership* 1.

SPECIAL BENEFITS TO PROPERTY. See *Public Improvements*.

SPECIAL ISSUES.

The special issue required to be submitted to the jury by the court under section 6, chapter 96, Code, may be waived by the litigants, and the issues submitted to the court in lieu of a jury; and in such case neither party can afterwards complain that such special issue was not directed. *Bank v. Hamilton*, 75.

SPECIFIC PERFORMANCE.

1. Possession, to entitle a person to specific execution of a parol contract, must be actual, notorious, and exclusive. *Woods v. Stevenson*, 149.
2. In a suit to enforce specific performance of a parol contract or agreement to devise or convey real estate, possession is an essential part performance of such contract. *Goodwin v. Bartlett*, 332.
See *Resulting Trust* 1.

STARE DECISIS.

Doctrine of *stare decisis* discussed. *Simpkins v. White*, 125.

STATUTES. See *Grand Jury* 2.

STATUTES OF FRAUDS. See *Order*.

STATUTE OF LIMITATIONS.

1. Express trusts, cognizable only in equity, are alone free from limitation created by *laches* or statute. All other trusts, whether legal or equitable, are either subject to the statute of limitations or liable to be barred by *laches*. *Woods v. Stevenson*, 149.
2. A creditor cannot set aside a voluntary conveyance, after five years from the making thereof, without proof of actual fraud participated in by the parties to the transaction. *Scrags v. Hill*, 162.
3. Plea of the statute of limitations is generally personal to the party, and not available to strangers; but privies in estate, as heirs, devisees, vendees, or mortgagees of the property may use it to defend their property. *McClougherty v. Croft*, 271.
4. Question: Can one judgment creditor of a living debtor plead the statute of limitations against another? *Id.*
5. The statute of limitations confers a legal title, enabling one not only to defend but to maintain ejectment or other action on its strength. *Parkersburg Indust. Co. v. Schultz*, 471.
See *Adverse Possession* 1; *Title* 1.

STATUTORY ACTIONS.

Where a person sues to recover money lost at gambling, stolen, or for which *indebitatus assumpsit* would lie at common-law

STATUTORY ACTIONS—*Continued.*

either phrase is sufficient in the summons to describe the cause of action. *O'Connor v. Dils*, 54.
See *Justice of the Peace* 2.

STOCK BOOK. See *Corporations* 1.

STOCKHOLDERS. See *Corporations* 1, 3, 4.

STOCKHOLDER AS DEFENDANT. See *Corporations* 3.

STRANGERS. See *Parties* 2.

STREETS. See *Dedication*.

SUBSEQUENT ENTRY. See *Adverse Possession* 6.

SUFFICIENCY OF EVIDENCE. See *Express Trust* 4.

SUITS PENDING. See *Judgment Liens*.

SUIT TO CANCEL OPTION.

A person holding such adverse title is not a necessary party to a suit instituted to cancel a lapsed optional contract for the sale of such land for the purpose of preventing the recovery of the consideration on the grounds of the failure thereof, as it is not necessary to, nor can the disputed question of title be settled in such suit, as the plaintiff is no longer interested therein, except in so far as it rendered the title bargained for by him unmarketable. *Morrison v. Waggy*, 406.

SUITS TO SELL REALTY.

Owners of vested estates in reversion and remainder, whether by legal or equitable title, are indispensable parties to a chancery suit to sell the fee; and the presence as parties of a tenant for life, or of the trustee holding for them, does not make them parties by representation, and a sale under the decree will not affect or pass their right in the land, *Williamson v. Jones*, 563.

SUMMARY PUNISHMENT. See *Contempt* 1.

SUPREME COURT OF APPEALS.

This Court is in duty bound to inquire into the constitutionality of an act of the legislature, when the question is properly presented for its consideration. *Price v. City of Moundville* 523.

SUMMONS. See *Equity Practice* 2; *Justice of the Peace* 4, 9; *Unlawful Detainer* 1, 3.

SURCHARGE AND FALSIFY. See *Settlements*.

SURETYSHIP.

Where two persons sign an obligation for the payment of money, and it is expressed in it that one signs as surety, and he annexes to his signature the word "surety," still both are bound jointly. *Riley v. Jarvis*, 43.
See *Pleading* 2.

SURFACE WATER. See *Damage to Real Estate* 1; *Municipal Corporations* 3, 4, 5.

SURPRISE. See *New Trial*.

SUSPENSION OF JUDGMENT. See *Justice of the Peace* 6.

TALESMEN. See *Grand Jury* 2.

TAX LEVIES.

Levies made by the county court to pay such district subscription must be limited to property within such district. *Neale v. County Court* 90.

TENANTS.

A tenant must make ordinary repairs to buildings, repair and keep up fences, remove and keep down filth growing on farming and grazing lands, at his own expense, unless otherwise provided in the lease. *Windon v. Stewart* 711. See *Guardian and Ward* 6.

TENANT FOR LIFE.

1. A tenant for life may work open salt or oil wells or mines even to exhaustion, without account, but cannot open new ones. *Williamson v. Jones* 562.
2. Things part of the land, wrongfully severed by a tenant for life, become personalty, but belong to the owner of the next vested estate of inheritance in reversion or the remainder, not the life tenant. *Id.*
3. A life tenant in possession is entitled to sue for damages done the property, by which the rental value thereof is diminished or destroyed. The measure of damages, as in other cases, is the amount necessary to make good the loss, which must be determined by the jury from the facts and circumstances shown in evidence. *Johnson v. Chapman*, 640.
4. The petroleum oil underlying a tract of land which has been devised to a life tenant who is in possession, and which is to go to certain infant children after the decease of the life tenant, may be sold, upon the petition of the guardian of said infants, under the provisions of chapter 82 of the Code, or leased; and the life tenant will be entitled to the interest on the royalty during the continuance of the life estate, and then the residue or corpus of the royalty will be paid to the remainder-men. *Wilson v. Youst*, 826.
See *Damage to Real Estate* 1, 2; *Equity Jurisdiction* 10; *Waste* 2.

TENANT IN COMMON. See *Waste* 3.

TITLE.

1. Title vested under the statute of limitations may be forfeited for non-entry for taxation or lost by adversary possession under the statute of limitations. *Parkersburg Indust. Co. v. Schultz*, 471.
2. One having notice of facts rendering his title inferior to another's, who, by mistake of law, regards his title good, can not claim for permanent improvements. *Williamson v. Jones*, 564.
See *Adverse Possession* 2; *Constructive Trusts* 3; *Evidence* 4; *Estoppel* 3; *Forged Deed*; *Pleading* 11; *Statute of Limitations* 5.

TITLE IN STRANGER. See *Ejectment*.

TITLE OF ACT. See *Legislature*.

TOWN BOUNDARIES.

The duty of a town council under section 48, chapter 47, Code 1891, to submit the question of a change of boundary to a vote, is mandatory, not ministerial or discretionary, if such petition as it prescribes is presented. *Shank v. Town*, 243.

TOWN COUNCIL. See *Town Boundaries*.

TRAIN MEN. See *Railroads* 5.

TRESPASS. See *Possession*; *Waste* 1.

TRIAL.

The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to trial courts, with which this Court ought not to interfere; and the trial courts must necessarily be vested with a large discretion in the regulation of their practice (*Railroad Co. v. Stimpson*, 14 Pet. 463), but such discretion does not extend to the exclusion of legal evidence offered in its proper order. *McManus v. Mason*, 196.

TRIAL BY JURY. See *Equity Jurisdiction* 2, 3.

TRIAL JUDGMENT. See *Pleading* 8.

TRUE OWNER. See *Possession*.

TRUSTS.

1. A trust may exist in any property, real or personal, which is, in the eye of a court of equity, property of value. *Currence v. Ward*, 368.

TRUSTS—*Continued.*

2. Where a trust is express, implications are thereby excluded. *Colman v. Parran*, 738.
3. Parol evidence to establish a trust must be clear and unquestionable to produce such result. *Armstrong v. Bailey*, 778. See *Statute of Limitations* 1.

TRUST CREDITOR.

When a deed of trust creditor has become the *bona fide* owner in fee of a married woman's real estate, he has the right to intervene in a suit instituted by a general creditor of such married woman seeking to rent such property, for the purpose of resisting such renting. *Cox v. Horner*, 787. See *Married Woman* 3.

TRUST *PRO TANTO*. See *Resulting Trust* 2.

TRUSTEES. See *Constructive Trusts* 1, 2; *Guardian and Ward* 5.

TRUSTEES OF MISSIONS. See *Wills* 5.

UNLAWFUL DETAINER.

1. Summons in unlawful detainer before a justice, *held good*. *Simpkins v. White*, 125.
2. Description of premises in unlawful detainer, *held good*. *Id.*
3. Description of premises in summons in unlawful detainer before a justice shall describe the premises with convenient certainty, so as to enable the sheriff to deliver possession; but that description need not be so certain as in itself and alone to enable him to do so, as he may deliver as the plaintiff, or information from other sources, may direct, so he do not violate the description in the summons. If that description can be rendered certain by extrinsic evidence, it is sufficient. *Id.*
4. In unlawful detainer before a justice, or on its appeal, a verdict, on full trial on the merits, will not be set aside because there was no plea and issue. The statute puts in the plea of not guilty. *Id.*, 126.

VACATING JUDGMENT. See *New Trial*.

VALIDITY OF DISPOSITION. See *Wills* 7.

VALIDITY OF RESERVATIONS. See *Dedication; Deed* 7.

VACANCIES. See *Pleading* 3, 13.

VENDOR AND VENDEE.

Where a person holding a limited optional contract for the sale of a tract of land is prevented from making sale thereof by reason of a cloud on the title, or a deficiency in quantity, not known or taken into consideration at the time of the execution thereof, such person is entitled to a rescission of such contract. *Morrison v. Waggy*, 405.

VENDOR'S LIEN.

1. A vendor who does not expressly retain a lien for the purchase money in a deed made by him for land has no implied lien therefor on such land, even as against his immediate vendee. *Scruggs v. Hull*, 162.
2. In a suit to enforce a purchase-money lien reserved in a deed conveying legal title, with only covenant of general warranty, it is not necessary to make prior lienors, holding liens against the property, parties, nor to refer the case to ascertain such liens, unless it appear that the vendor is insolvent. But if the plaintiff in his bill shows such liens, and propose to have the purchase-money go to discharge them, the owners of such prior liens must be parties. *McClougherty v. Croft*, 270.
3. In a suit to enforce a purchase money lien reserved in a conveyance containing a covenant for further assurance, and one of general warranty, where prior liens appear, the plaintiff can not have a decree for his debt until such liens be removed. If such liens appear of record unreleased, and be not shown discharged or barred, the vendor is entitled, if he asks it, to a reference to ascertain whether they exist. *Id.*
4. Though, when suit was brought to enforce a vendor's lien, the land was under a prior lien by deed of trust, making the trustee and creditor necessary parties, yet where, pending it, the trust has been released by release, revesting legal title in the owner, decree may be made, without making such trustee and creditor parties. *Id.* 271.
5. In enforcing a vendor's lien for purchase money, the court, in rendering its decree, will ascertain the aggregate amount of principal and interest due on the notes executed for such purchase money, for which the vendor's lien is retained, to the date of the decree, and decree that interest be paid on such aggregate from the date of the decree. *Triplitt v. Lake*, 428.
6. If the court, in enforcing such vendor's lien, aggregates the amount of principal and interest to the date of the decree, and then decrees that the defendants pay interest on such aggregate amount for several months prior to the date of the decree, this is such a mistake as may be safely amended on motion, under section 5 of chapter 134 of the Code, and which should be amended on motion to the circuit court. *Id.*

VERDICT. See *Criminal Law* 1; *Detinuc; Justice of the Peace*, 7, 10; *Unlawful Detainer* 4.

VERDICT WITHOUT ISSUE.

The rule that a verdict without issue is bad, questioned by BRANSON, JUDGE. *Simpkins v. White*, 126.

VICE PRINCIPAL. See *Railroads* 2.

VOID DEED. See *Adverse Possession* 1.

WAIVER. See *Appeal* 2; *Justice of the Peace* 3, 9; *Special Issues*.

WARD'S PERSONAL ESTATE. See *Guardian and Ward* 7.

WARD'S REALTY. See *Guardian and Ward* 3, 4.

WASTE.

1. Petroleum oil in place is part of the land. Its wrongful extraction by one unlawfully in possession is waste, and by a stranger is trespass; in both cases irreparable injury, which may be enjoined. *Williamson v. Jones*, 562.
2. It is waste in a tenant for life to take petroleum oil from the land, for which he is liable to the reversioner or remainderman in fee. *Id.*
3. It is waste in a tenant in common to take petroleum oil from the land, for which he is liable to his co-tenants to the extent of their right in the land. *Id.*
4. A tenant for life, or a tenant in common in sole possession claiming exclusive ownership, taking petroleum oil, and converting it to his exclusive use, is liable to account on the basis of rents and profits, not for annual rental. *Id.*, 563.
5. A tenant for life, who, by waste, has severed from the realty things that are part of it, as petroleum oil, has no right to have their proceeds invested so he may have interest therein during the life estate, but their proceeds go at once to the owner of the next vested estate of inheritance. *Id.*, 563.
See *Equity Jurisdiction* 10, 11; *Oil* 1.

WEIGHT OF EVIDENCE. See *Review on Appeal*.

WIFE. See *Wills* 1.

WIFE'S SEPARATE ESTATE. See *Husband and Wife* 1, 2.

WILLS.

1. When any provision for a wife is made in her husband's will, unless, within one year from the time of the admission of said will to probate, she renounces such provision, as provided in section 11 of chapter 78 of the Code, she shall have no more of such estate than is given her by the will. *McGlaughlin v. McGlaughlin's Legatees*, 227.
2. A will which contains the following clause: "I desire that all my just debts be paid out of my estate as soon after my decease as convenient," does not thereby create a charge upon the testator's real estate. Real estate is not chargeable with pecuniary legacies unless the intention so to charge is expressed in the will, or such intention appears by implication. *Id.*
3. If a will can be proved independently of the testimony of an attesting witness beneficially interested therein, a devise or

WILLS—*Continued.*

- bequest to such witness or her husband is not void. *Davis v. Davis*, 300.
4. S., by his last will and testament, directed that after his funeral expenses, *etc.*, were paid, the residue of his estate, both real and personal, be given equally between the three following benevolent causes, *viz.*: Home missions, foreign missions, and the American bible Society; that is, to the trustees of each of the above causes. He meant the home and foreign missions of the Southern Presbyterian Church, except five hundred dollars which he directed to be loaned, and the interest on same to be applied annually to the support of pastor's salary, of the Southern Presbyterian Church at Centerville, Monroe County, W. Va. Upon a bill filed praying that said bequests be declared void, *held*, that said bequests are void, on account of the uncertainty of the beneficiaries. *Pack v. Shanklin*, 304.
 5. The "Trustees of Home Missions and Foreign Missions of the Southern Presbyterian Church" can not be considered to be a corporation identical with the one known as the "Trustees of the General Assembly of the Presbyterian Church in the United States," chartered by the legislature of North Carolina. *Id.*
 6. In the interpretation of a will, the true inquiry is not what the testator meant to express, but what do the words used express. *Id.*
 7. To the validity of every disposition as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal. *Id.*
See *Executors* 5; *Express Trust* 4.

WITNESS.

1. A witness may be competent to testify concerning some of the facts in issue, though incompetent as to others. *South Branch Ry. Co. v. Long's Am'r.*, 131.
2. A party to an action, or interested therein, may testified to any fact which is material in evidence, and does not involve a personal transaction or communication with the opposite party, notwithstanding the death or insanity of the latter. *Id.*
3. Where a defendant in an action of *assumpsit* for services rendered him by plaintiff, as a witness in his own behalf denies that he ever contracted with the plaintiff, and that he ever employed him for any purpose, and had nothing to do with his employment, and did not owe him a cent, the question, "Did you ever give plaintiff any directions about the work for the price of which he has brought this action?" is proper on cross-examination, and it is error to exclude it. *McManus v. Mason*, 196.
4. Where the defendant appears as a witness in his own behalf,

WITNESS—Continued.

the plaintiff has the right to so cross-examine him as to elicit any facts which would in any way tend to corroborate the testimony of plaintiff, or contradict that of defendant. *Id.*

5. A written contract dividing land specifies a fence as a line, and on the day of the contract, just after its signing, one of the two parties surveys the lines, fixing a certain fence as the one referred to in the contract. That party cannot, after the death of the other, give evidence denying the fixing of that fence as the line. *Anderson v. Jarrett*, 246.

WRIT OF ERROR. See *Pleading* 8.

WRITTEN CONTRACT. See *Assumpsit*.

Ex. 13.

